Nos. 77-1575, 77-1648 and 77-1662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

MIDWEST VIDEO CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT MIDWEST VIDEO CORPORATION

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COUNTERSTATEMENT

A. Events Leading to This Proceeding

The mandatory origination rule which was before this Court in 1972 in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) (hereinafter "*Midwest I*") had been stayed by the Federal Communications Commission (hereinafter "FCC")

while that case was pending before this Court.[1] After *Midwest I*, which upheld the mandatory origination rule, the stay continued in effect, and in early 1974, the FCC launched a proceeding reevaluating that rule.[2] In December 1974, the FCC repealed the mandatory origination rule[3] for the following reasons:

> Quality, effective, local programming demands creativity and interest. These factors cannot be mandated by law or contract. The net effect of attempting to require origination has been expenditure of large amounts of money for programming that was, in many instances, neither wanted by subscribers nor beneficial to the system's total operation. In those cases in which the operator showed an interest or the cable community showed a desire for local programming, an outlet for local expression began to develop regardless of specific legal requirements. During the suspension of the mandatory rule, cable operators have used business judgment and discretion in their origination decisions. For example, some operators have felt compelled to originate programming to attract and retain subscribers. These decisions have been made in light of local circumstances. This, we think, is as it should be. *Report and Order in Docket No. 19988*, 49 FCC 2d 1090, 1105-06 (1974).

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[1] *Suspension of Community Antenna Television Mandatory Origination Rule Pending Further Judicial Review*, 36 Fed. Reg. 10876 (1971).

[2] *Notice of Proposed Rule Making In Docket No. 19988*, 46 FCC 2d 139 (1974).

[3] The FCC adopted an alternative rule (the equipment availability rule) in that proceeding, requiring cable systems with 3,500 or more subscribers, regardless of the size of the markets in which they operated, to purchase equipment for the production of local programming, to make this equipment available to the public, and to make cable channel time available for the presentation of programs thus produced. Midwest Video Corporation petitioned the United States Court of Appeals for the Eighth Circuit for review of the FCC's order adopting that rule, but the adoption of superseding rules in this proceeding largely mooted the issues in that case, and it was voluntarily dismissed. *Midwest Video Corp.* v. *FCC*, No. 75-1671 (8th Cir., dismissed Apr. 12, 1976).

In the meantime, while *Midwest I* was pending before this Court, the FCC in early 1972 issued the *Cable Television Report and Order*, 36 FCC 2d 143, *recon. generally denied*, 36 FCC 2d 326 (1972), in which it adopted extensive rules governing cable television carriage of broadcast signals, providing for public access to and use of nonbroadcast channels, establishing cable television technical standards, and allocating regulatory authority between federal and state or local governments. Under these rules, cable systems operating in the 100 largest television markets (the "top 100 markets") were permitted to carry greater numbers of distant television signals than systems in smaller markets.[4] The FCC recognized that carriage of additional distant signals would increase the attractiveness of the service package offered by the cable system, and as a *quid pro quo* for the benefits of increased signal carriage the FCC imposed channel capacity and access obligations on top 100 market cable systems. Under the rules adopted in 1972, top 100 market cable systems were required to have two-way transmission capability, to provide equipment for production of public access programming, and to provide at least 20 channels for cable television operations. Three of these channels would be reserved for use as access channels, to be made available at no charge[5] to public, educational, and governmental users. Cable systems were also required to adopt operating rules providing for access channel use on a first come, nondiscriminatory basis, with no control by the cable operator over program

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[4] In the top 100 markets, cable systems were authorized to carry a minimum of two distant non-network signals. In the smaller markets, cable systems were authorized to carry only one distant non-network signal, and then only if there was not a local non-network station. *Compare* Section 76.59 with Section 76.61 and 76.63 of the Rules as published in *Cable Television Report and Order, supra*, 36 FCC 2d at 230-233.

[5] While no charge was to be made for use of these channels, reasonable charges could be made for the cost of production, except that no production charge could be made for live presentations of less than five minutes' duration on the public access channel. The no-charge provision was to be permanent in the case of the public access channel and for a five-year minimum period following construction of the cable system for the educational and governmental channels.

content. All cable system channels not used for the carriage of broadcast signals or for public, educational or governmental access were to be available for leased access use, again on a first come, nondiscriminatory basis. No such requirements were imposed on systems located outside of the top 100 markets.[6] Midwest Video Corporation (hereinafter "Midwest") operates no cable systems in the top 100 markets, so the access and channel capacity obligations adopted in the 1972 *Cable Television Report and Order* were not applicable to it.

In 1975, shortly after repealing the mandatory orgination rule, the FCC initiated the proceeding here under review to consider possible revision of the channel capacity, access and and other requirements of its cable television rules.[7] The proceeding culminated in the adoption in May 1976 of the *Report and Order in Docket No. 20508* (hereinafter "the *1976 Order*")[8] and the rules which are the subject of the present proceedings.

B. The 1976 Order

In the *1976 Order* adopting the rules here under review, the FCC modified the access rules adopted in 1972 and extended

[6] Top 100 market cable systems which had been in operation prior to March 31, 1972, were given until March 31, 1977 to come into compliance with the access and channel capacity rules.

[7] At approximately the same time, the FCC initiated a proceeding to suspend the March 31, 1977 compliance date specified in the *Cable Television Report and Order* for top 100 market cable systems to come into compliance with the channel capacity and certain other requirements of the rules adopted therein. The compliance date was suspended in the FCC's *Report and Order in Docket No. 20363*, 54 FCC 2d 207 (1975), *petition for review pending sub nom. National Black Media Coalition* v. FCC, No. 75-1792 (D.C. Cir.).

[8] 59 FCC 2d 294 (1976). The *1976 Order* is also set forth in Appendix B of the Petitioner's Appendix at 93-181. (The Petitioner's Appendix will subsequently be referred to as "App."). Petitions for Reconsideration of that action were denied in December 1976. *Memorandum Opinion and Order in Docket No. 20508*, 62 FCC 2d 399 (1976) (hereinafter "*Reconsideration*"), Appendix C of App. at 182-206.

their applicability to all cable systems having 3,500 or more subscribers. Although the FCC found that "in the vast majority of communities presently providing multiple channels for access use, these channels are at best sporadically programmed" (App. 138) and even though in its *Reconsideration* the FCC recognized that "even larger systems typically have difficulty finding access channel users" (App. 191), the FCC nevertheless adopted rules which require all cable systems with 3,500 or more subscribers, wherever located, to provide channel time, production equipment and studio facilities at little or no cost, lease channels for commercial use, and rebuild their facilities to have channel capacity sufficient to provide channels for these purposes. Notwithstanding the FCC's willingness to leave program origination decisions formerly required under the mandatory origination rule to marketplace forces and local circumstances, the FCC refused to follow a similar course of action with respect to access requirements:

> Were we at this stage of cable's evolution to leave the provision of channel capacity and access services entirely to the marketplace, such action could have the practical effect of providing a barrier to the growth of new services which we expect of cable. *1976 Order* (App. 156).

The rules adopted in the *1976 Order* contain the following requirements applicable to all cable systems having 3,500 or more subscribers:

> (a) When constructing new cable systems, a minimum channel capacity of twenty channels[9] and the technical capability for two-way, non-voice communication must be installed.[10]

[9] As set forth in note 11, p. 6, *infra*, there is a difference between channel capacity and activated channel capacity, and typically even cable systems with a twenty channel capacity cannot deliver more than twelve channels to subscribers unless they also install converters.

[10] Top 100 market systems in operation prior to March 31, 1972 and other systems in operation by March 31, 1977 have until June 21, 1986 to comply with this requirement. Section 76.252 (App. 168-69).

(b) To the extent of their activated channel capability,[11] cable systems must make four separate access channels available, with public, educational, local government and leased access users each assigned a separate channel.[12] If there is not sufficient demand for each channel full-time for its designated use, the four types of access can be combined on one or more channels,[13] but if demand on any access channel exceeds specified usage criteria, the cable system must, to the extent of its activated channel capability, within six months make yet another access channel available.[14] A limited grandfathering provision permits cable systems which were in operation on June 21, 1976, the effective date of the rules, to continue operating without a dedicated access channel if at that time the

[11] A cable television system's activated channel capability is the number of usable channels which it actually provides to the subscriber's home, or which it could provide by making comparatively inexpensive ($800 to $1,200) modifications to its facilities. *1976 Order* (App. 141-142). Typically, cable systems are limited to an activated capacity of twelve channels unless converters are installed at the television set of each subscriber. (In some cases electrical interference rendering some channels unusable reduces activated channel capacity even further.) Through the use of converters, programming transmitted on cable channels which television sets are not equipped to receive can be converted to channels which can be received by home sets. In the *Notice of Proposed Rule Making* instituting this proceeding, 53 FCC 2d 782, 785 (1975), the FCC estimated the cost of converters at $25 to $40 per subscriber, exclusive of labor; the FCC recognized in the *1976 Order* that the cost of installing converters in a 3,500 subscriber system, at $40 per converter, would be at least $140,000 (App. 136-37). In view of these costs, the FCC provided that cable operators need not install converters to meet their obligations under the new rules, except where systems commencing operation after June 21, 1976 or any systems adding a new non-local signal do not have at least one specially designated channel available on a full-time basis for access use. Sections 76.254(c), (d) and (e) (App. 171); *1976 Order* (App. 139-41).

[12] Section 76.254(a) (App. 169-70).

[13] Section 76.254(b) (App. 202).

[14] Section 76.254(d) (App. 171).

system had insufficient activated channel capability to dedicate one full channel for access programming, but new systems commencing operation after that date and existing systems seeking to add a broadcast signal after that date must have at least one fully dedicated access channel even if they must install converters in order to do so.[15]

(c) Cable systems must have available a studio and equipment for the local production and presentation of programs and permit use of the studio and equipment for the presentation of public access programs.[16]

(d) The rules prohibit the cable operator from assessing any charge for the use of one public access channel[17] and from assessing any charge for the use of educational and governmental access until five years after the cable system first offers channel time for those purposes.[18] The rates which may be charged for leased access channels must be "appropriate".[19]

(e) With respect to the equipment, personnel and production costs for public access programming, the charges "shall be reasonable and consistent with the goal of affording users a low-cost means of television access. No charge shall be made for live public access programs not exceeding five minutes in length."[20] Even when charges for equipment, personnel, or production may be imposed, the cable system may not charge for the use of its playback equipment or its personnel required to operate such equipment in order to present tapes or film provided by public access channel users when no use of the cable system's production equipment is involved and the tape or film can be played without further technical alteration to the cable

[15] Section 76.254(c) (App. 171) and *1976 Order* (App. 140-41).

[16] Section 76.256(a) (App. 172).

[17] Section 76.256(c)(2) (App. 173).

[18] Section 76.256(c)(1) (App. 173).

[19] Section 76.256(d)(3) (App. 174-75).

[20] Section 76.256(c)(3) (App. 173).

system's equipment.[21] The rules also require that cable systems not limit the use of access channels to normal business hours.[22] The combined effect of these requirements is that cable operators may not impose charges designed to amortize the cost of tape or film playback equipment needed to present public access programming and must have personnel available or on call, at their own expense, for an unspecified but substantial number of hours beyond the normal work day, to operate the playback equipment.

(f) Each cable system must promulgate rules providing for first-come, nondiscriminatory access on public and leased channels.[23] Cable systems may not exercise any control over programming content on any of the access channels except that operators must adopt rules prohibiting the transmission of lottery information and, for all but leased access channels, commercial matter.[24]

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[20] Section 76.256(c)(3) (App. 173).

[21] *Reconsideration* (App. 199-200).

[22] *Reconsideration* (App. 198-199).

[23] Section 76.256(d)(1) and (3) (App. 173-175).

[24] Sections 76.256(b) and (d) (App. 172-75). The rules also require cable systems to include in their operating rules a prohibition against the transmission of obscene and indecent matter on their access channels. This aspect of the access rules has been stayed by the U.S. Court of Appeals for the District of Columbia Circuit in an Order filed on August 26, 1977 in *American Civil Liberties Union v. FCC*, No. 76-1695 (D.C. Cir.). The Eighth Circuit also concluded that this requirement imposed impermissible censorship obligations on cable systems (App. 75-77). The FCC did not seek review of that conclusion and has instituted a review of the provision of the rules dealing with obscene and indecent matter on access channels. While this aspect of the access rules is therefore no longer at issue in this proceeding (G. Br. 15, n. 15), the result is that the combined effect of the stay of the rule requiring cable systems to censor obscene and indecent programming and the rule forbidding cable systems to exercise program content control leaves cable systems without any basis for declining to present obscene or indecent programming on access channels, thus risking loss of subscribers and alienation of franchising authorities. Moreover, the transmission of such programming could subject the cable operator to criminal liability under state and local ordinances—a consideration which led the Eighth Circuit to conclude that the access rules violate the due process clause of the Fifth Amendment (App. at 79-82).

(g) Despite the burdensome nature of the access requirements, which in 1972 the FCC recognized as the *quid pro quo* for permitting top 100 market cable systems to carry two distant non-network signals at the time it first imposed access obligations on cable systems,[25] the signal carriage rules were not amended to permit cable operators such as Midwest, who first became subject to the access rules as a result of the *1976 Order*, to carry any additional non-network signals.

The access rules first adopted in the *Cable Television Report and Order, supra*, and modified and extended to cable operators outside the top 100 markets by the *1976 Order*, impose obligations vastly different in both scope and kind from those before this Court in *Midwest I*. The mandatory origination rule did not require dedication of any channels solely for origination and left to the cable operator's discretion when and where on his channels he would provide program originations and the content of those originations. It imposed no channel capacity or building requirements and no limitations on how the cable operator might recoup the costs he incurred for the use of his channels (e.g., through advertising or charges to programmers). The access rules, on the other hand, remove from the cable operator control over who may use the cable system's channels and how, require the cable operator to forego the opportunity to earn any revenue from the service provided on most access channels, require the cable operator to have equipment or personnel available or on call, in many instances without charge, at the whim of access users, and require most cable systems to provide a less attractive total service package to subscribers than they would otherwise be able to provide because of the unavailability of one or more channels which are reserved or used for access.

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[25] *Cable Television and Order, supra*, 36 FCC 2d at 190.

C. Cable Systems Select From a Multitude of Program Sources

The Government, in its Brief,[26] has described the operation of the access rules as follows:

> [A] cable system must allow four groups (the public, educational authorities, local governments and paying lessors) to use available channels of the system that the cable operator is not using for broadcast retransmission or pay programming services. The rules do not require the system to displace those services in favor of providing access. (G. Br. 11) (citation and footnote omitted).

This description implies that the number of broadcast and pay programming services available to cable systems are not usually sufficient to require cable systems to make a choice between available broadcast signals and pay services, that there are no other types of programming services from which cable systems can select to fill their channels, and that the access requirements therefore do not seriously impair the choice of programming that cable systems can offer. But this is simply not the case. The FCC's signal carriage rules adopted in 1972, shortly before this Court's decision in *Midwest I*, accorded cable systems some choice in selecting the number of broadcast signals they could carry, and amendments to those rules since 1972 have substantially increased the number of available signals and programming choices. Of even more importance, the development of satellite communications has produced a revolution in the technological means utilized for delivering both broadcast and non-broadcast programming to cable systems, and numerous

[26] The Brief for the United States and the Federal Communications Commission will be referred to herein as the Government Brief and cited as "G. Br." The Brief for the American Civil Liberties Union (hereinafter "ACLU") will be cited as "ACLU Br." The Brief for the National Black Media Coalition et al. (hereinafter "NBMC") will be cited as "NBMC Br."The Brief Amicus Curiae for the Motion Picture Association of America (hereinafter "MPAA") will be cited as "MPAA Br."

programmers have commenced utilizing this new distribution technology. These developments have resulted in the availability of an abundance of programming to cable systems.

1. FCC Signal Carriage Rules

In *Cable Television Television Report and Order, supra*, the FCC in 1972 overhauled its rules regulating the carriage of television signals.[27] These rules and subsequent developments are briefly summarized below.

> (a) Under the rules adopted in 1972, cable systems in and near the top 100 markets were authorized to carry at least two distant non-network signals, but those signals had to come from one of the two closest top 100 markets. In smaller markets, one distant non-network signal could be carried but only if there was no local non-network station. Cable systems located outside of all television markets were not subject to any restriction on the number of distant signals they might carry. In addition, all cable systems could carry the signal of any noncommercial educational station operated by an agency of the state in which the system is located, any other noncommercial educational signals in the absence of objection by local noncommercial educational interests, and any television station broadcasting predominantly in a non-English language.[28] The 1972 rules also contain provisions permitting top 100 market cable systems to substitute programs from distant stations when protecting the contractual exclusivity rights of local stations in non-network programs or when the distant station is carrying a program primarily of local interest to the community in which the station operates.[29]

[27] The new rules carried forward the requirements in the rules before this Court in *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968), for carriage of local television stations.

[28] See Sections 76.57-76.63 as originally promulgated, *Cable Television Report and Order, supra*, 36 FCC 2d at 230-233.

[29] See Section 76.61(b)(2)(ii). This rule as originally adopted is set forth in *Cable Television Report and Order, supra*, 36 FCC 2d at 232, and the rule has not been changed since its adoption but has been recodified as Section 76.61(b)(2), 47 CFR 76.61(b)(2).

(b) In 1974, the FCC amended its rules to permit most cable systems to carry unlimited amounts of late-night programming. As amended on reconsideration, this rule permits carriage of late-night programming from any television station beginning at 1:00 A.M. (12:00 midnight in the Central and Mountain Time Zones) until sign-on of the first local station unless there is a local station that broadcasts continuously from midnight to 6:00 A.M.[30]

(c) In 1976, the FCC eliminated the restrictions described in (a) above which limited the choice of distant non-network signals cable systems could carry to those from the closest markets.[31] This change was significant because, with the advent of satellite distribution of television signals, it greatly increased the ability of cable systems to choose non-network signals, consistent with the signal carriage limitations, whose programming would provide the most diversity to their subscribers.[32]

(d) Also in 1976, the FCC amended and expanded its rule authorizing carriage of non-English language stations to permit carriage of any specialty station (*i.e.*, a station that generally carries foreign-language, religious and/or automated programming for one-third of the hours in an average broadcast week and one-third of weekly prime time hours) and the signal of any station when it is broadcasting a foreign language, religious or automated program.[33] At the time the FCC ruled on the petitions for reconsideration in that proceeding, it released a list[34] of 26 stations throughout the country which met its definition of

[30] *Report and Order in Docket No. 20028*, 48 FCC 2d 699 (1974), *as modified upon reconsideration*, 54 FCC 2d 1182 (1975).

[31] *Report and Order in Docket No. 20487*, 57 FCC2d 625 (1976), *recon. denied*, 59 FCC2d 934 (1976).

[32] *Infra*, pp. 17-18.

[33] *First Report and Order in Docket No. 20553*, 58 FCC2d 442 (1976), *recon. denied*, 60 FCC2d 661 (1976).

[34] Appendix B to its *Memorandum Opinion and Order* denying reconsideration, 60 FCC2d at 670.

specialty station, and since that time the FCC has added an additional eleven stations to the list.[35] The FCC has also authorized the carriage of English-language programs directed to specific ethnic groups as specialty programming upon the individual request of cable operators.[36]

Thus, the FCC's rules,[37] despite the still extensive restrictions on the signals cable systems can provide to their subscribers, permit the carriage of a large number of broadcast signals and accord cable operators a considerable measure of discretion in signal and program selection, especially in the selection of the most desirable non-network signals whose carriage is consistent with the limits on the number of such signals which can be carried, in the availability of late-night programming, in the unlimited choice of educational and specialty stations and specialty programming, and in program substitutions when distant non-network stations are carrying programs primarily of local interest or programs to which local stations hold exclusive rights.

2. Domestic Satellite Service to the Cable Industry

Although the first domestic satellite service in the United States commenced in December 1973, domestic satellites were not used to provide service to cable systems until August 1, 1975, when the FCC granted the first authorization to a cable

[35] The signal of at least one specialty station is distributed by satellite and available to cable systems throughout the country. See the discussion of KTBN, *infra*, p. 16.

[36] *See, e.g., Gerity Broadcasting Company*, 63 FCC 2d 230 (1977).

[37] Other less significant changes were also made in the FCC's signal carriage rules, such as permitting cable systems to carry any network program not broadcast by stations normally carried, *Reconsideration of Cable Television Report and Order, supra*, 36 FCC2d at 333-334; permitting cable systems to carry the second feed of early evening network news programs in some circumstances, *Report and Order in Docket No. 19859*, 57 FCC2d 68 (1976); and permitting cable systems to carry the signals of any UHF station within whose Grade B contour the system operates, *Report and Order in Docket No. 20496*, 65 FCC2d 218 (1977), *recon. denied*, 43 Pike & Fischer Radio Regulation 2d 1553 (1978).

system for its own receive-only earth station.[38] Between that date and December 15, 1976, when the FCC, in its Declaratory Ruling and Order in *American Broadcasting Companies, Inc.*, 62 FCC 2d 901 (1977), authorized cable systems to utilize less expensive small diameter antennas on their earth stations, over 100 earth stations were installed by cable operators.[39] By April 15, 1977, 136 earth stations had been licensed or authorized to cable systems,[40] and by April-May 1978, this number had increased to 422.[41] In its Brief, MPAA estimates the current number of earth station authorizations at 600, with this number increasing at a rate of about 25 per week (MPAA Br. 5, n. 4), and the FCC, in a news release issued December 4, 1978,[42] stated that over 1,300 earth stations serving cable systems, broadcast stations and others who distribute video programming are currently licensed.

At the time the first cable television earth station was authorized, the only programming regularly available to cable systems was the pay programming[43] of Home Box Office, Inc.[44] In

[38] *Florida Cablevision*, 54 FCC2d 881 (1975).

[39] *American Broadcasting Companies, Inc., supra*, 62 FCC2d at 911.

[40] Television Digest's *1977 CATV and Station Coverage Atlas*, pp. 196a-200a.

[41] Television Digest's *1978 Cable Station Coverage Atlas*, pp. 205a-217a.

[42] Action in Docket Case, Report No. 14610, Dec. 4, 1978.

[43] "Pay programming," as that term is used in this Brief, is programming for which a customer pays a specific charge either for individual programs or for a separate channel of programming not available to nonsubscribers. Pay programming usually consists primarily of recent motion pictures, though some pay program distributors also provide sports events and other programming originated by or purchased by the distributor. Pay programming is offered to members of the public not only by cable systems but also by broadcast stations which have received subscription television authorizations from the FCC and by the lessees of common carrier facilities licensed by the FCC in the Multipoint Distribution Service, as well as by tape or film in some apartment houses and hotels. When cable systems offer pay programming, they make a charge for the service in addition to the normal subscription fee charged for delivery of television signals and other originated programming.

[44] This is the programming Florida Cablevision was authorized to receive. *Florida Cablevision, supra* note 38, 54 FCC2d at 882.

the short span of three and one-half years since then, as the number of earth stations has increased, so too has the amount of satellite distributed programming available to cable systems. Since the FCC restricts cable systems only in the carriage of broadcast signals, most of the satellite distributed programming can be added by cable systems without obtaining any authorization from the FCC other than an earth station license. The types of programming currently available or expected to be available by satellite in the near future are as follows:

(a) Three companies currently offer pay programming by satellite.[45] Home Box Office, Inc. and Showtime Entertainment Inc. offer primarily movies and occasional special programming. Fanfare Television provides both movies and sports events, with the sports consisting primarily of home games of professional sports teams in Houston, Texas.[46] Two of these companies, Home Box Office, Inc. and Showtime Entertainment Inc. have plans to offer a second pay program package providing a smaller number of programs each month at a lower price.[47]

(b) Three companies, Christian Broadcasting Network, PTL (People That Love), and Trinity Broadcasting Network, each offer a channel of religious programming by satellite. The Christian Broadcasting Network and PTL

[45] Several other parties offer pay programming to cable systems through tapes, cassettes, or terrestrial microwave facilities. One of these parties, Warner Cable Corp., has announced that it will convert its cassette pay cable operation to satellite and will offer that service to other companies. "Warner Cable Now Offering *Star Channel* Feed to Others," *Pay TV Newsletter*, Dec. 4, 1978, p. 5. The increase in the number of parties offering pay programming by satellite may be in part attributable to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977), which invalidated restrictive FCC rules limiting the pay programming that could be provided by cable systems.

[46] *Broadcasting*, May 1, 1978, p. 63, and May 22, 1978, p. 75.

[47] *Broadcasting*, Aug. 7, 1978, p. 58 (Showtime); and *Pay TV Newsletter*, Sep. 6, 1978, p. 1 (HBO).

programming consist of originated programming rather than transmission of a broadcast signal, while the Trinity Broadcasting Network programming consists of the satellite distributed signal of Station KTBN, a specialty station licensed to Fontana, California (a community in the Los Angeles television market).[48]

(c) U.A. Columbia Cablevision, Inc. distributes a program package consisting primarily of sports events from Madison Square Garden and offers cable systems the option of providing this programming to their subscribers as pay programming or as part of the basic service package.[49] This year U.A. Columbia Cablevision, Inc. also offered, as an additional option to its service, movies for children.[50]

(d) In December 1978, Warner Cable Corp. announced plans to commence distribution in February 1979 of a full channel of children's programs thirteen to fourteen hours per day, seven days per week, to cable systems via satellite.[51]

(e) The licensee of a number of Spanish-language television stations distributes Spanish-language programming to its stations and affiliates by satellite, and it also makes its Spanish-language programming available to cable systems which are not within the service areas of television stations receiving the programming.[52]

(f) Satellite programming in the news and public affairs areas has also commenced. The initial effort

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[48] *Cablevision*, Nov. 6, 1978, p. 45; *CATJ* (Official Journal of the Community Antenna Television Association), September 1978, pp. 24-32.

[49] *Broadcasting*, Apr. 11, 1977, p. 62.

[50] *Broadcasting*, Aug. 21, 1978, p. 48.

[51] "Warner Cable Slates Children's Channel with Quality Fare," *Wall Street Journal*, Dec. 5, 1978, p. 20.

[52] "Cable Operators and Programmers Overshadow Marketing Types at C-TAM Meeting," *TV Communications (TVC)*, Oct. 1, 1978, pp. 58-60.

involves the distribution of still news pictures which change approximately every fifteen seconds and with a voice providing the news information related to the pictures. Both the pictures and the voice-over are supplied by United Press International and they are updated throughout the day with the most recent news developments.[53] A more expansive effort in this area is expected to commence in early 1979 when the Cable Satellite Public Affairs Network is scheduled to begin distributing live coverage of proceedings in the House of Representatives and other public affairs programming.[54] And the party who owns the licensee of WTCG, currently the broadcast signal with the widest satellite distribution, has under consideration a twenty-four hour, live, satellite-fed news service for the cable industry.[55]

(g) On December 15, 1976, the FCC authorized a common carrier lessee of domestic satellite facilities to distribute by satellite the television signal of Station WTCG, a non-network station in Atlanta, Georgia, to cable systems throughout the country.[56] On October 25, 1978, the FCC authorized four common carriers to distribute by satellite the signal of WGN-TV, a non-network station in Chicago,[57] and on November 22, 1978, the FCC authorized a common carrier to distribute by satellite the

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[53] *Broadcasting*, Jul. 10, 1978, p. 36.

[54] *Broadcasting*, May 8, 1978, p. 49; "CATV to Cover Congress Fully," *The New York Times*, May 2, 1978.

[55] *Broadcasting*, Nov. 20, 1978, pp. 70-71.

[56] *Southern Satellite Systems, Inc.*, 62 FCC 2d 153 (1976). Carriage of this signal by cable systems is widespread. MPAA, in a proceeding in which it sought unsuccessfully to restrict the distribution of television signals by satellite, estimated that by June 1977, only six months after satellite distribution of WTCG was authorized, requests to carry WTCG from 672 cable systems serving 1.2 million subscribers had either been granted or were pending. *Motion Picture Associaiton of America, Inc.*, 68 FCC 2d 57 (1978).

[57] *United Video, Incorporated*, FCC 78-766 (released Nov. 9, 1978).

signal of KTVU, a non-network station in Oakland.[58] A number of other applications by common carriers to deliver by satellite the signals of non-network television stations are pending before the FCC, and in order to facilitate the processing of those applications, the FCC has delegated authority to its staff to act on these applications.[59]

Thus, in the short period of time since the commencement of satellite transmission to cable systems, a wide variety of program offerings, many of them consisting of non-broadcast materials whose carriage is not limited by the FCC's distant signal rules, has become available, and more can be expected[60] as even more cable systems install earth stations.[61]

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[58] Letter dated November 22, 1978 from the Chief, Facilities and Services Division of the FCC's Common Carrier Bureau to Satellite Communications Systems, Inc.

[59] *United Video, Inc., supra* note 57, at ¶24, n. 19. Other television signals for which applications are pending for delivery by satellite include the signals of KTTV, Los Angeles, California (Application of Satellite Communications Systems, Inc., File No. W-P-C-2131 and Application of ASN, Inc., File No. W-P-C-2332), WPIX, New York, New York (Application of Southern Satellite Systems, Inc., File No. W-P-C-2168), WSBK-TV, Boston, Massachusetts (Application of Eastern Microwave, Inc., File No. W-P-C-2291), and WOR-TV, New York, New York (Application of United Video, Inc., File No. W-P-C-2265, Application of Eastern Microwave, Inc., File No. W-P-C-2291, and Application of ASN, Inc., File No. W-P-C-2332).

[60] RCA American Communications, Inc. (RCA), whose domestic satellite provides most of the satellite originated programming to the cable television industry, has announced that it plans to launch a third satellite next year. RCA currently provides eighteen channels of programming to cable systems and expects to be able to provide twenty-four channels after launch of its new satellite. "RCA Corp. to Launch Third U.S. Satellite in December 1979 at a Cost of $40 Million," *Wall Street Journal*, Dec. 5, 1978, p. 8.

[61] ACLU questions whether Midwest has standing to challenge some aspects of the FCC's access rules since, according to ACLU, the public record indicates that Midwest does not currently operate at its current 12-channel capacity (ACLU Br. 14), and ACLU has submitted a chart purporting to show the number of channels actually

D. The Eighth Circuit Decision

In a decision entered February 21, 1978, the United States Court of Appeals for the Eighth Circuit ("the Eighth Circuit") filed its decision setting aside the FCC's *1976 Order* and the rules adopted therein. The Eighth Circuit held that the *1976 Order* had exceeded the FCC'S jurisdiction as established by this Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (hereinafter "*Southwestern*") and *Midwest I*. Recognizing that the Act does not specifically provide for the regulation of cable television and that the types of regulation which this Court has affirmed are only those reasonably ancillary to the FCC's authority to regulate broadcasting, (App. 20-31), the Eighth Circuit concluded that the access rules were invalid because they were not consistent with either the statutory objectives of broadcast regulation (App. 32-50) or the statutory means of regulation applicable to broadcasters (App. 50-64).

The Eighth Circuit also discussed First and Fifth Amendment constitutional considerations present in the *1976 Report* which reinforced its conclusion on the jurisdictional issue.[62] In

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transmitted on Midwest's cable systems (ACLU Br. 12, n. 19). The first system listed by ACLU serves Bloomfield and Dexter, Missouri, and has fewer than 3,500 subscribers. It is therefore not subject to the FCC rules here at issue. As to the other systems, ACLU has failed to note that each of them has earth station authorizations, one of which has been in operation for several years, and the remaining of which have recently been authorized and have either just commenced operation or will commence operation in the near future. Thus, as a result of the grant of these earth station authorizations, Midwest is in the process of making selections from the satellite-distributed programming specified above which will in most instances exhaust its remaining activated channel capacity and which will be limited by the requirement in the access rules that one channel be set aside for access purposes. There can therefore be no question about Midwest's standing to challenge the FCC's requirement that cable systems dedicate one channel to access. Moreover, while ACLU was also a party to these proceedings in the Eighth Circuit, it has not explained why it has waited until this late date to challenge Midwest's standing.

[62] The concurring judge did not join in the Eighth Circuit's discussion of constitutional considerations.

concluding that the access rules would be impermissible under the First Amendment, the Eighth Circuit relied on two factors: first, that there was nothing in this case to indicate a constitutional difference between cable systems and newspapers in the context of the government's power to compel access and that an access requirement for newspapers had been invalidated in this Court's decision in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (App. 72-74); and second, that the access rules strip cable operators on their access channels of "all rights of material selection, editorial judgment, and discretion enjoyed by other private communications media, and even by the 'semi-public' broadcast media" (App. 73). With respect to the Fifth Amendment, the Eighth Circuit suggested that the access rules constitute an uncompenstated taking of property (App. 77-79), exposed cable operators to the risk of civil and criminal liability (App. 79-82), and were an unwarranted intrusion into the conduct of a cable enterprise (App. 62).

Finally, the Eighth Circuit indicated that there was a serious question whether the access rules could be sustained on the basis of the administrative record then before it (App. 82-91).

SUMMARY OF ARGUMENT

This Court's decisions in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) and *United States v. Midwest Video Corporation*, 406 U.S. 649 (1972) define the outer limits of the FCC's jurisdiction over cable television. These cases establish the principle that the parameters of the FCC's delegated authority are derived from the broadcasting sections of the Act and the regulatory goals prescribed by those sections. The access rules exceed these outer limits for two reasons. First, the access rules substantially impair the judgment and editorial control of cable systems in selecting among the multitude of available programming, consisting of broadcast signals, locally originated programming, and satellite-delivered programming,

in filling their channels. This impairment is contrary to a fundamental goal of broadcast regulation—the preservation of the values of private journalism and editorial control. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). Second, the access rules compel cable systems to operate as common carriers on their access channels. *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976); *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976). But the effectuation of broadcast related goals by common carrier means is specifically prohibited by Section 3(h) of the Act, 47 U.S.C. §3(h). Since the limits on the FCC's authority over cable systems are derived from the broadcasting sections of the Act, this prohibition is applicable not only to the FCC's regulation of broadcasters pursuant to its direct authority, but also to the FCC's ancillary authority to regulate cable television. In any event, the access rules impose obligations on cable systems so totally different from those heretofore recognized that the decision about whether the FCC has jurisdiction to impose them should be made by Congress, *see, e.g., TelePrompTer Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), which considered a "rewrite" of the Communications Act during the last Session of Congress, H.R. 13015, 95 Cong., 2nd Sess., and will in all likelihood consider the matter further during the current Session.

Cable systems have important First Amendment rights in the selection and origination of programming from the abundance of program material available, and contrary to this Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), the access rules restrict these rights in order to enhance the voices of access users. The principal grounds relied upon to restrict the First Amendment rights of broadcasters—spectrum scarcity and pervasiveness (and the related consideration of accessibility to children)—are not applicable to cable systems, and this Court has rejected economic scarcity and other considerations as a basis for imposing access obligations on news-

papers. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). For First Amendment purposes, therefore, cable systems function like newspapers in offering a variety of services in order to increase subscriptions and should be treated the same under the First Amendment. Moreover, even if the more limited First Amendment rights of broadcasters are deemed applicable to cable systems, this Court's decision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra*, establishes the importance of editorial control and discretion in the regulation of broadcasting, and *Miami Herald Publishing Co.* v. *Tornillo, supra*, establishes the primacy of editorial control and discretion over whatever values may exist in promoting the self-expression of access users. Thus, whether cable systems are analogized to broadcasters or newspapers or something in between, the access rules violate their First Amendment rights.

The access rules also violate the due process and taking clauses of the Fifth Amendment. Under the due process clause, the government may not compel cable operators to change the fundamental nature of their business and become common carriers, even as a condition to their right to retransmit broadcast signals. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583 (1926). With respect to the taking clause, the effect of the access rules is to take channels from cable systems for the benefit of access users and to compel cable operators to subsidize a noncompensatory common carrier service, for the presumed benefit of the public, with revenues derived from their private business of retransmitting broadcast signals and other programming. This is a taking under standards recently clarified by this Court in *Penn Central Transportation Company v. City of New York*, 57 L.Ed.2d 631 (1978). Nor can the compensation requirement be satisfied by the presumed ability of cable operators to subsidize access facilities and services with revenues derived from their other business. *Brooks-Scanlon Company* v. *Railroad Commission of Louisiana*, 251 U.S. 396 (1920).

Finally, the access rules are unsupported by record evidence of a public demand for access services. This is not a case like *FCC v. National Citizens Committee for Broadcasting*, 56 L.Ed.2d 697 (1978), where the FCC should be allowed discretion to forecast the direction in which the public interest lies under circumstances where the benefits the FCC is seeking to achieve are not easily quantified. The evidence before the FCC was clearly that there is no significant demand from access users or cable subscribers for access services, even where facilities existed (App. 89-90, n. 87), and the FCC indicated that it was relying on a mere "hope" that demand would develop if more facilities were built (App. 156). A more convincing record of need should be required where the rules impair constitutional rights. *United States v. O'Brien*, 391 U.S. 367 (1968).

ARGUMENT

I. THE ACCESS RULES EXCEED THE FCC'S ANCILLARY JURISDICTION OVER CABLE TELEVISION

A. Midwest I Established the Outer Limits of FCC Jurisdiction Over Cable Television

When the Communications Act was enacted in 1934, cable television technology did not exist and was not foreseen. In *Southwestern*, this Court held that the FCC had jurisdiction to regulate cable television to the extent necessary to prevent it from harming broadcasters and undermining "the effective performance of the FCC's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. In *Midwest I*, this Court made a quantum jump and affirmed mandatory origination rules which were designed not to protect the scheme of broadcast regulation from the impact of cable television operations but, instead, to make cable operators perform functions analogous to those imposed on broadcasters and originate local programming in order to affirmatively

promote broadcast regulatory goals. These origination rules were upheld by a mere plurality of this Court. The Chief Justice concurred only in the result, stating:

> Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts. 406 U.S. at 676.

It is clear from this language by the Chief Justice, whose vote was necessary to provide the plurality in *Midwest I*, that the mandatory origination rules represent the outer limits beyond which the FCC may not go in regulating cable television without further legislation. Both the Eighth Circuit below (App. 26) and the D.C. Circuit in *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 28 (1977), *cert. denied*, 54 L. Ed. 2d 484 (1977), have interpreted *Midwest I* as establishing the outer limits of Commission jurisdiction over cable television.

As will be shown below, the access rules go far beyond these limits. They strip cable operators of editorial control and discretion over their channels for reasons unrelated to the effectuation of the broadcast licensing sections of the Act, and they impose common carrier obligations on cable systems. Because these results are contrary to a fundamental goal of broadcast regulation and contrary to a specific limitation on the methods which the FCC may use to achieve broadcast objectives, the access rules exceed the FCC's ancillary jurisdiction over cable television recognized by this Court in *Southwestern* and *Midwest I*.

B. The Access Rules Substantially Impair the Cable System's Editorial Control In the Selection and Presentation of Programming It Delivers to Its Subscribers

The Government alleges (G. Br. 11) that the access rules do not require cable systems to displace broadcast retransmission and pay programming services in favor of providing access, though in a footnote (G. Br. 38-39, n. 33) it does recognize two examples (the only two it can envision) of potential conflicts between cable operator's needs and the demands of access users which might require resolution in favor of the access user. The Government suggests that these conflicts may nevertheless be resolved in favor of the access user. While the Government's examples involve cable systems having a twelve channel capacity, it should be noted that the problems raised in those examples are typical of the kinds of problems that even cable systems with twenty or more channels face under the access rules. Many cable systems are already required by the FCC's mandatory signal carriage rules to carry more than twelve local broadcast signals,[63] and even where there are fewer local broadcast signals available, the programming choices described in the Counterstatement[64] are sufficient now to exhaust the capacity of many cable systems having twenty or more channels. As cable systems and the numbers of persons subscribing to them continue to grow and as new means of program distribution develop, even more programming is likely to be produced. And while these developments are likely to result in cable systems increasing their channel capacity to provide greater programming diversity to subscribers, channel capacity will never be sufficient to present all of the available programming. But whether twelve or twenty or

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[63] Problems raised by the abundance of local broadcast signals having mandatory carriage rights on cable systems in some sections of the country are under consideration by the FCC in its *Notice of Proposed Rule Making in Docket No. 21472*, 42 *Fed. Reg.* 60180 (1977).

[64] *Supra*, pp. 10-18.

more channels are involved, the Government in its examples totally fails to recognize the effect of the access rules on the programming judgment of cable systems, and the Government's discussion of the resolution of even the potential conflicts it recognizes between cable operator's needs and the demands of access users is contrary to plain statements the FCC made in adopting the *1976 Order* and fails to recognize significant problems with its own suggested resolution of those issues.

One of the Government's examples of a potential conflict between the cable operator's needs and the demands of access users involves the cable operator who carries broadcast signals on eleven of his twelve activated channels and who desires to add a twelfth broadcast signal (G. Br. 38-39, n. 33). The Government says that the *1976 Order* "suggests" that the last activated channel would have to be reserved for access and then points out that Section 76.254(c) does not "expressly" provide that the channel reserved for access must be one of the twelve activated channels that can be received without converters. But the FCC has stated explicitly:

> [W]e do not envision certificating new systems *or the addition of new signals* whose carriage is not mandatory to existing systems, if the activated channel capability available for the provision of access services is insufficient to provide at least one full channel for access programming. *1976 Order* (App. 141) (emphasis added).

Thus, it is clear that a system with twelve activated channels carrying eleven broadcast signals could not add one of the broadcast signals now or soon to be available by satellite without installing converters to increase its activated channel capacity.

The Government's other example involves the situation where the cable operator uses eleven channels for broadcast retransmission and pay programming and desires to use the last

activated channel for his own origination services (G. Br. 38, n. 33). According to the Government, the rules "indicate" that the cable operator would have to install converters to activate a thirteenth channel rather than relegate access users to that course. But rather than accepting this result as what the rules require, the Government points to a footnote in the *1976 Order* stating as follows:

> It is our intention that every reasonable effort be made to accommodate the various competing channel uses. It is not our intention that established cablecast services provided by system operators be automatically displaced. While we generally believe that automated services such as time and weather should give way to access uses, if other irreconcilable conflicts between channel uses develop, we are prepared to consider each such situation individually on its merits. We recognize that many of the services provided on these channels, such as community information, consumer price lists, etc., clearly provide a substantial benefit to subscribers. *1976 Order* (App. 143, n. 19).

There are several problems with the Government's approach to this example. For instance, the footnote the Government relies on only refers to "established" cable services, and the Government's example does not involve an established service. Moreover, if the FCC does seek to resolve a conflict between the programming choice of cable operators and the demands of access users, it will be in the position of a national program director, trying to decide whether a particular origination proposal by a cable operator, such as a channel of religious programming, or a channel of sports events from Madison Square Garden, or a channel presenting live debates from the House of Representatives, or a channel of children's programming, should take priority over existing or incipient access efforts. In rejecting the concept of similar ad hoc program judgments under the prime time access rule applicable to television stations, the Second Circuit stated that "*ad hoc*

decisions are not desirable because they suggest a system of censorship. . . ." *NAITPD v. FCC*, 516 F.2d 526, 540 (2nd Cir. 1975). In any event, the FCC has signaled how it would rule on the Government's example:

> [W]e believe access programming should continue to have priority status over operator-originated programming when they compete for the final available channel on a cable system. *Reconsideration* (App. 195).

This subordination of operator-originated programming to access programming is remarkable because origination programming, including everything from coverage of city council meetings, to consumer information, to local high school sports events, to entertainment programming, is the very kind of programming which the FCC required cable operators to present under the mandatory origination rule upheld by this Court in *Midwest I*.

Moreover, if these are the only two potential conflicts the Government has been able to discern between the cable operator's needs and the demands of access, the Government has simply not tried to apply the access rules in the context of programming abundance described in the Counterstatement.[65] There are at least four categories of programming which the FCC has clearly indicated that cable operators may not add if such programming would occupy the last available channel and leave no channel for access uses. The first two, additional distant broadcast signals and non-automated operator-originated programming, have already been discussed.[66] The third is pay programming. Although pay programming being presented on June 21, 1976, the effective date of the access rules, will not be displaced, pay programming may not be added after that date if no channel would be left for access uses:

> We have sought to encourage the presentation of [pay] programming for it provides diversity of viewing

[65] *Supra*. pp. 10-18.
[66] *Supra*, pp. 26-28.

> choices to the public. We do not, however, believe that the public interest will be served if this programming is provided at the expense of local access efforts which are displaced. Should a system operator for example have only one complete channel available to provide access services we shall consider it as clear evidence of bad faith in complying with his access obligations if such operator decides to use that channel to provide pay programming. *1976 Order* (App. 145).

Fourth, the FCC indicated that "automated services such as time and weather channels should give way to access uses" (App. 143).

Other conflicts between the needs of the cable operator and the demands of the access user abound. Consider for example, a twelve channel cable system, which as required by the rules has reserved a channel for access, and carrier Spanish language programming on one channel, religious programming on one channel, and broadcast signals on nine channels. The cable system then learns that access programming on the reserved channel exceeds the usage criteria in Section 76.254(d). Must the cable system take off the Spanish language or religious programming to make room for an additional access channel? Or suppose a cable system is confronted with a demand to lease its vacant channel to a party desiring to present pay programming consisting of movies which largely duplicate a pay programming service offered by the cable operator, and the cable operator desires to present a new and non-duplicative service such as the Madison Square Garden sports events or a channel of news and public affairs programming.[67] Or suppose that a system with a twenty channel capacity has, in accordance with the usage criteria in Section

[67] The FCC has already indicated that it would have trouble deciding in favor of the cable operator in this situation:

> We shall scrutinize the actions of operators who, while providing their own programming, assert that their activated capacity is insufficient to permit the leasing of a channel to potential competitors. *1976 Order* (App. 144-45).

76.254(d), provided four or more access channels, the balance of its channel capacity is utilized for broadcast signals and originated program carriage, and then a new program service (such as the children's program channel described in the Counterstatement[68]) becomes available. Suppose further that marketing and audience surveys show that very few subscribers watch one or more of the access channels but there is a strong subscriber interest in the newly available programming. May the cable operator reclaim one of the access channels for the newly available programming?[69] The rules would seem to resolve most of these questions in favor of the access users, but presumably the Government would argue that those questions also could be brought to the FCC pursuant to the language quoted above in footnote 19 of the *1976 Order* (App. 143, n. 19). But to do so would enmesh the FCC even further in making value judgments between different types of programming. Moreover, if the FCC did decide that a cable operator could reduce the number of access channels in order to present other available and desirable programming, the FCC would be creating a further serious difficulty for itself. With access programming then presented on a smaller number of channels, there would inevitably be disputes about how the cable operator was administering the first come, non-discriminatory aspects of the rules, and the FCC would become enmeshed in resolving these disputes.[70] This would even further cast the FCC in the role of a national program director, choosing between the scheduling requests of competing access users.

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[68] *Supra*, p. 16.

[69] The FCC appears to have already answered this question:

> We do not consider as acting in good faith an operator with a system of limited activated channel capacity who attempts to displace existing access uses with his own origination efforts. *1976 Order* (App. 144).

[70] Similar FCC involvement in the administration of access channels will develop on systems having only one access channel and no additional activated channel capacity if usage of the single access channels grows to such an extent that all of the parties desiring to use the channel cannot be accommodated.

C. The Access Rules Violate a Fundamental Goal of Broadcast Regulation—The Preservation of the Values of Private Journalism and Editorial Control

No delegation of power to a regulatory agency is absolute. There must be standards against which it can be determined whether the agency has exceeded the powers conferred by Congress. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Where Congress gives an agency broad power to adopt such rules and regulations as the public interest requires, the delegation is at least limited by the objectives of the statute. *American Trucking Associations, Inc. v. United States*, 344 U.S. 298, 313 (1953); *NAACP v. FPC*, 425 U.S. 662, 669 (1976).

This Court upheld the mandatory origination rule in *Midwest I* because it would

> . . . "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . . ." 406 U.S. at 667-668 (quoting from the FCC's opinion adopting the rule).

The Government argues (G. Br. 26-27) that *Midwest I* controls the jurisdictional issue here because the access rules are designed to serve the very same objectives. However, the Government fails to acknowledge an equally important objective of broadcast regulation—the preservation of values of private journalism and editorial control. Because the access rules compel cable operators to function as common carriers and to abandon editorial control over message content on one or more dedicated access channels, the access rules are antithetical to the statutory goal of preserving these values. And because this goal of preserving values of private journalism and editorial control is at least as important a limitation on the FCC as is the goal of increasing local outlets, the access rules exceed the FCC's delegated power. The origination rule in *Midwest I* was

found to serve the goals of increasing outlets for local expression and diversity of program choices, and it was not inconsistent with the equally important goal of preserving values of private journalism and editorial control. But, it is not enough that the access rules might promote some broadcast objectives if they also contravene other equally important statutory objectives which limit the FCC's power. Therefore, *Midwest I* cannot be dispositive of the jurisdictional issue here.

That preservation of values of private journalism and editorial control is a fundamental feature and objective of the broadcast provisions of the Act, to which the FCC's jurisdiction over cable television is ancillary, is clear from Section 3(h) of the Act[71] and its legislative history, as explained by this Court in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (hereinafter "*Columbia Broadcasting System*"). Section 3(h) provides that

> . . . a person engaged in radio broadcasting [including television by subsequent construction] shall not, insofar as such person is so engaged, be deemed a common carrier.

In *Columbia Broadcasting System*, this Court held that neither the Communications Act nor the First Amendment required broadcasters to accept paid editorial advertisements. The Court discussed the origin of the Communications Act and the specific history of Section 3(h), including rejected proposals to impose access obligations on broadcasters. The Court concluded that Congress had intended to preserve values of private journalism and editorial control:

> Congress pointedly refrained from divesting broadcasters of their control over the selection of voices; §3(h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. 412 U.S. at 116.

[71] 47 U.S.C. § 153(h).

The Court quoted Professor Alexander Meiklejohn to the effect that

> . . . "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said . . . ." 412 U.S. at 122.

And the Court rejected the view that

> . . . every potential speaker is "the best judge" of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. 412 U.S. at 124.

Thus, as this Court recognized, values of private journalism and editorial control are at the core of the scheme of broadcast regulation established by Congress. The preservation of these values is an explicit and paramount objective of broadcast regulation. The access rules exceed the FCC's ancillary jurisdiction because they are antithetical to this objective.

It is no answer to argue, as have the petitioners herein, that cable operators have sufficient channel capacity to accommodate access uses without foreclosing other programming options. As shown in the Counterstatement,[72] there are numerous sources of entertainment and informational programming, including news services, from which cable operators can choose if they are not required by the FCC to reserve channels for access uses. If the FCC's purpose in adopting the access rules was to give everyone a chance to be on television, then, of course, the editorial function is irrelevant. But that would be a goal having no basis in the Act. On the other hand, if the FCC's goal is to assure that the important things are said, then selection of voices by the cable operator as editor is essential. The access rules are contrary to that goal and thus exceed the FCC's jurisdiction over cable systems.

[72] *Supra*, pp. 10-18.

D. Cable Systems Do Not Function as Common Carriers But Are Compelled to Do So By the Access Rules

Common carrier status has been defined in the communications context according to two tests.[73] First, a person must hold himself out to carry for all customers indifferently. *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976). This "holding out" test for common carriage has been adopted by the FCC in *First Report and Order in Docket No. 15586*, 1 FCC2d 897, 900 (1965). The second test is that the customer must decide what is to be transmitted. *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976). Thus, the FCC has recognized that a common carrier functions as a "pipeline . . . without affecting or influencing the content of the information communicated." *Multipoint Distribution Service*, 45 FCC2d 616, 618 (1974).

The access rules compel cable operators to provide a common carrier service. Sections 76.254(a) (App. 169-170) and 76.256(d) (App. 173-175) require cable operators to hold their facilities out for public use, and Section 76.256(b) (App. 172-73) prohibits cable systems from exercising program content control on their access channels. Moreover, just as common carrier rates are regulated, the FCC has regulated the rates cable operators may charge for access services. As provided in Sections 76.256(c) and (d) of its rules (App. 173-175), the FCC has provided that one public access channel "shall always be made available without charge"; that the educational and local government access channels must be made available free of charge for five years; and that "an appropriate rate schedule" must be specified for the leased access channel.

[73] For a similar definition in the transportation context, see *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211 (1927); and HUTCHINSON ON CARRIERS §47a (2d ed. 1891).

The Petitioners begrudgingly accept the fact that the access rules impose common carrier obligations on cable systems[74] but seek to make a virtue of necessity. For example, the Government argues (G. Br. 27) that the access rules "fall more clearly" within the jurisdictional limits established in *Midwest I* because cable television's traditional retransmission function is in the nature of common carriage and the carriage of access programming is closer in nature than local origination to this traditional function. Similarly, NBMC argues that the FCC's rules requiring cable systems to carry local television signals already require cable systems to perform a common carrier function (NBMC Br. 35).

Remarkably, at virtually the same time the FCC was participating with the Solicitor General in the preparation of the Government's argument that the traditional function of cable systems is in the nature of common carriage, the FCC released a *Report and Order in Docket No. 20829*, 43 *Fed. Reg.* 53742 (1978), purporting to justify its regulation of the equal employment opportunity practices of cable operators on the rationale that cable operators were *not* merely common carriers with no control over message content. In *NAACP v. FPC*, *supra*, this Court held that the FPC had no authority to regulate the employment practices of the common carriers otherwise subject to its jurisdiction because employment practices were unrelated to the statutory purposes and functions of the FPC. The Court distinguished FCC regulation of the employment practices of broadcasters because of the relationship between the employment profile of a station and the manner in which broadcasters ascertain community needs, which affects the exercise of their programming discretion. In order to demonstrate that cable operators are comparable to broadcasters for the purpose of employment regulation so that it could support its jurisdiction to adopt equal employment opportunity rules applicable to cable systems, the FCC discussed the program-

[74] The Government states that the access rules "can be viewed as a limited form of common carriage-type obligation" (G. Br. 39).

ming discretion of cable operators in detail. It summarized this discussion at ¶16 of its *Report and Order in Docket No. 20829* as follows:

> In sum, both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide. And, while this control may vary in kind and degree from the discretion exercised by broadcasters, it is nonetheless extensive and fully adequate to justify our regulatory efforts to ensure that it is exerted in a nondiscriminatory fashion. (Footnote omitted.)[75]

[75] The detailed basis for this conclusion by the FCC in Docket No. 20829 is similar to Midwest's Counterstatement in this Brief. For the Court's benefit, ¶¶14-15 of the FCC's *Report and Order in Docket No. 20829* are quoted below:

> We are not persuaded that the program discretion exercised by cable television operators is so narrowly circumscribed. The Commission's rules, for example, afford every system located outside of all television markets unlimited discretion in choosing its permissive signal complement. This same freedom also applies to all small systems (less than 1,000 subscribers), regardless of market location. Further, in the first 100 markets it is virtually impossible for cable systems to have their entire carriage selection dictated by the rules, and all systems are unrestricted in their carriage of specialty stations. A similarly unfettered choice is available to operators in their carriage of educational stations, as well as in their selection of alternative program sources under the late-night programming provisions of the rules. The suggestion, moreover, that the limited technical availability of signals seriously restricts the scope of these carriage options is difficult to credit. The increasing use of common carrier, CARS and earth station signal importation methods, as well as the regulatory need to limit distant signal carriage in the first place, certainly argue to the contrary. We conclude that cable operators exercise substantial program discretion in the context of their carriage determinations and that such discretion clearly affords the opportunity for discriminatory choices which our EEO rules are properly intended to avoid. The latter point is exemplified with particular force in the case of specialty stations, whose wide availability is especially conducive to achieving our goal of program diversity and is positively encouraged by Commission policy. It seems most unlikely, however, that cable systems engaged in employment discrimination based on ethnic background or religion, for example, would undertake carriage of stations that direct their programming to individuals characterized by the very ethnic or religious traits which the operator has discriminated against in employment.

> Origination programming, of course, provides an even more direct and pervasive form of program discretion than signal selection. And, while it is true that cable systems are no longer required to produce such material, this fact is not jurisdictionally dispositive. The relevant point is that every system may, and contrary to CZR's contention a substantial number of systems do, originate programming. As of September 1, 1977, for example, data compiled by Television Digest, Inc., indicated that out of 3,911 operating systems, 1,097, or 28.04%, offered non-automated origination programming. It is apparent, moreover, that even those systems whose originations consist exclusively of "pre-packaged" premium programming (*i.e.*, "pay-cable") are capable of exerting a form of content control over the material supplied to them by such sources as Home Box Office, Inc. Beyond the fact that systems can initially select pay programming from several alternative sources, they may, and in our experience do, decline to carry particular programs provided by these sources at various times and for various reasons, in much the same manner that television broadcast stations may fail to "clear" programming supplied to them by a national television network. In such circumstances, of course, systems may also select replacement programs and thus engage directly in a programming function. (Footnotes omitted.)

It is clear from this discussion that even the [illegible] has come to realize that because of their "extensive" program discretion, cable systems do not function like common carriers.

Even the requirement in the FCC's rules that cable systems carry the signals of local broadcast stations does not impose a common carrier function. This Court affirmed the FCC's authority to regulate cable television because such regulation was necessary in order to perform its statutory responsibilities for the "orderly development of an appropriate system of local

television broadcasting." *Southwestern*, 392 U.S. at 177. In so concluding, this Court relied in particular on Section 307(b) of the Act,[76] mandating the FCC to distribute broadcast licenses so as to provide a "fair, efficient and, equitable radio service" to each of the States; Section 303(f),[77] authorizing the FCC to adopt regulations preventing "interference between stations and to carry out the provisions" of the Act; and Section 303(h),[78] authorizing the FCC to "establish areas or zones to be served by any station." In affirming the rules requiring carriage of local stations, the Eighth Circuit, relying on this Court's decision in *Southwestern*, stated that "[t]he crucial consideration is that they [cable systems] do use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service." *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (1968). The FCC requirement that cable systems carry local broadcast signals thus effectuates the broadcast licensing sections of the Act and is completely different in both scope and kind from regulations requiring cable systems to hold out their facilities for indiscriminate use by members of the public.[79]

E. The Use of Common Carrier Means to Achieve Broadcast Objectives Is Specifically Prohibited By the Act

As shown above, the access rules impose common carrier obligations on cable systems. These means are utilized to promote the broadcast objectives of increasing local outlets and

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[76] 47 U.S.C. §307(b).

[77] 47 U.S.C. §303(f).

[78] 47 U.S.C. §303(h).

[79] The FCC has long held that the function of retransmitting broadcast signals by cable systems is *not* common carriage. *Frontier Broadcasting Co. v. Collier*, 24 FCC 251 (1958). This view has been approved by the courts. *National Association of Regulatory Utility Commissioners v. FCC*, *supra*, 533 F.2d at 608, n. 26. In *Southwestern*, 392 U.S. at 169, n. 29, this Court stated:

> The Commission and the respondents are agreed, we think properly, that these CATV systems are not common carriers within the meaning of the Act.

augmenting program diversity. The Government defends this choice of means as follows:

> [T]he reasonableness of the means chosen to further those statutory policies clearly depends on the particular characteristics of the communications medium to which they are applied. (G. Br. 30)

To the same effect, NBMC states:

> Thus, cable access is well within traditional Commission actions, but in a mode and manner unique to cable television. (NBMC Br. 21)

Both of these parties approach this case as if the objectives of broadcast regulation were the only limits on the FCC's jurisdiction over cable television.

If the Communications Act did not contain any specific guidance from Congress about the means which the FCC may use to attain broadcast objectives, then it might follow that the objectives themselves were the only standards against which to determine whether the FCC had exceeded its delegated power. *FPC v. Texaco, Inc.*, 417 U.S. 380, 387 (1974); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). However, Section 3(h) of the Act does represent a clear and specific congressional prohibition against using common carrier means to attain broadcast objectives. Therefore, the FCC's delegated power is limited not only by the objectives of the broadcast provisions of the Act but also by congressional specificity as to regulatory methods.

It was not necessary to reach this issue in *Midwest I* because the origination rules did not impose common carrier obligations on cable operators. This explains the Court's focus there on broadcast objectives as the principal consideration limiting the FCC's ancillary jurisdiction over cable television and the Court's failure to discuss broadcast regulatory methods as another limiting factor. Both the Eighth Circuit below (App. 50-53) and the D.C. Circuit in *Home Box Office, Inc.* v. *FCC*, *supra*, 567 F.2d at 31, have indicated their views that the

Commission may not regulate cable television with methods not available for broadcast regulation.[80] Section 3(h) reflects a clear congressional intent to limit the power delegated to the FCC. Other regulatory methods not suitable but not prohibited for broadcasting might be deemed valid with respect to cable television if Section 3(h) or other specific provisions of the Act were not violated, because, in the absence of congressional specificity as to means, the FCC has considerably more flexibility in fashioning regulatory means appropriate for achieving broadcast-related objectives. But here the FCC has chosen a regulatory method which is specifically prohibited in Section 3(h).

It would be anomalous if, in determining the appropriate goals of cable television regulation, the FCC was referred to the broadcast provisions of the Act, while the means specified in the Act as inappropriate for broadcast regulation could then be ignored. And while it should be clear, in light of the language quoted above from the *Columbia Broadcasting System* case, that an access requirement of the kind here involved could not be imposed on broadcasters, the Government seeks to find an opening for access obligations on broadcasters from language in that case and from other sources. Thus, the Government quotes (G. Br. 29, n. 24) the following language from this Court's opinion in the *Columbia Broadcasting System* case:

> Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of

[80] There is dictum in *American Civil Liberties Union v. FCC*, 523 F.2d 1344, 1351 (9th Cir. 1975), which would appear to support the Government's views on jurisdiction in this proceeding. Midwest does not take issue with the specific holding in that case, *i.e.*, that the FCC was not required to impose full Title II common carrier regulation on cable systems. However, the dictum indicating that the access rules as then in effect were within the FCC's statutory authority to adopt should not be considered persuasive in view of the fact that no party before the court was asserting that the access rules already imposed common carrier requirements on cable systems or was challenging the FCC's authority to do so.

> limited right of access that is both practicable and desirable. 412 U.S. at 131.

The Government also refers (*id.*) to certain instances where it alleges that a kind of limited right of access has been imposed on broadcasters, including the personal attack rule and the requirement in Section 312(a)(7) of the Act that broadcasters provide time for candidates for federal office. But in the two instances cited, the broadcaster is only required to make reasonable time available. With respect to the personal attack rule, the broadcaster can avoid the obligation entirely by simply not broadcasting personal attacks, and under both requirements, the broadcaster retains substantial discretion with respect to both scheduling and the amount of time offered. Moreover, as to both the personal attack rule, *Polish American Congress v. FCC*, 520 F.2d 1248 (7th Cir. 1975), and Section 312(a)(7), *Federal Political Candidates*, 43 Pike & Fischer Radio Regulation 2d 1029 (1978), the FCC relies upon the good faith judgment of the licensee as to what constitutes reasonable time under the particular circumstances involved. Thus, broadcasters do not function like common carriers with no editorial control over their facilities when complying with the personal attack rule and Section 312(a)(7). These very limited obligations therefore do not substantially impair the values underlying Section 3(h) and involve obligations entirely different in both scope and kind from the common carrier obligations imposed by the access rules here involved.[81]

[81] Some of the parties to these proceedings seek to separate the channel capacity, two-way, and equipment availability aspects of these rules from the other provisions of the rules relating directly to the provision and operation of access channels and to analyze each of those aspects separately. But the Government has recognized that the channel capacity rules "were adopted in part to provide the capacity to meet access obligations" (G. Br. 35) and has recognized that the equipment availability provisions of the rules "are more closely tied to the access rules [than are the channel capacity requirements], since they require the availability of equipment for access purposes" (G. Br. 36, n. 32). All of these aspects are interrelated and are discussed jointly in this Brief. The jurisdictional and constitutional considerations in support of channel capacity or equipment availability

F. The Question of the FCC's Authority to Adopt Access Rules Should Be Resolved By Congress

In *TelePrompTer Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), the Court was faced with a situation concerning the status of cable television under the Copyright Law of 1909. The Court stated:

> These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress. 415 U.S. at 414.

And Congress ultimately responded with new copyright legislation. The situation is similar here. Congress has left this Court in the position of having to define the FCC's jurisdiction over the emerging and developing cable television industry on the basis of a law, the Communications Act of 1934, which was enacted at a time when cable television technology did not exist and was not foreseen.[82] Moreover, the FCC's jurisdiction over cable television was before the last Session of Congress in a "rewrite" of the Communications Act, which was introduced on June 7, 1978,[83] and it would have excluded cable television

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requirements, when not tied to access requirements and when supported by a record showing the need for such requirements, their relevance to broadcast regulatory goals, and their consistency with broadcast regulatory means, would present different questions from those that are before the Court on this record. Here, all three aspects of the FCC's rules are so closely interrelated that they all should be set aside as exceeding the FCC's jurisdiction.

[82] A similar situation was before this Court recently in *Tennessee Valley Authority v. Hill*, 57 L.Ed. 2d 117 (1978), the snail darter case, where the Court again deferred to Congress.

[83] H.R. 13015, 95th Cong., 2nd Sess.

from federal regulation altogether. While there was no final action on H.R. 13015, it is likely that a rewrite will again be introduced during the coming session of Congress.

In an effort to show congressional acquiescence to FCC regulation of cable television, the Government refers (G. Br. 33-34, n. 31) to a few statutes in which Congress has treated cable operators like broadcasters, including the equal opportunities and fairness obligations in Section 315 of the Act, the ban on cigarette advertising, and forfeitures. The Government states:

> These actions confirm Congress' understanding that the Commission is to regulate cable television systems, and certainly do not reflect any congressional objection to the principle of imposing access, equipment availability and channel capacity requirements on such systems. (G. Br. 34, n. 31)

The Government makes too much of these laws. At most, they indicate that Congress has accepted *Midwest I* and recognizes that cable operators may be regulated in the same way as broadcasters. But the access rules go beyond these limits. As to such regulations, Congress has been silent. And by that silence, just as it did by its silence about copyright, Congress has failed to deal with a situation requiring congressional guidance.

G. The ACLU and MPAA Briefs

ACLU argues that Midwest cannot even raise questions relating to multiple access channel requirements because "the demand for public access to the Midwest Video System has not been shown to exceed the capacity of a single otherwise unused channel" (ACLU Br. 15).[84] ACLU's position is untenable for at least two reasons. First, ACLU is in effect arguing that the government can adopt the most absurd rules imaginable so long as, based upon current conditions, the rules would not

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[84] Midwest has already responded to ACLU's related assertion that Midwest's cable system do not currently operate at their current twelve channel capacity. *Supra*, pp. 18-19, n. 61.

immediately be applicable to anyone. But what of the chilling effect of such requirements on the program diversity and programming judgments of cable systems? For example, a cable operator may not purchase and install an earth station to add a channel of satellite-delivered programming if that channel will be subject to displacement by access users. Or a cable system may decide not to invest in converters or new cable to increase activated channel capacity in order to take advantage of satellite-delivered programming if many of the new channels might be preempted for non-compensatory access uses. Second, the FCC itself recognized that "even larger systems typically have difficulty finding access channel users," *Reconsideration* (App. at 191), so it is not surprising that Midwest has not yet been faced with use of multiple access channels. However, if the FCC can adopt rules based on its intuition that usage of access channels will increase,[85] Midwest should also be able to assume that the FCC's intuition will prove correct and be able to show the effect of multiple access channel requirements on cable systems.

Brief note should also be taken of the perplexing Brief filed by Amicus Curiae MPAA. MPAA states that the Eighth Circuit's invalidation of the access rules "eliminates competition, restricts programming choices available to cable viewers and proffers an open and continuing invitation to anti-competitive conduct by the operators of cable systems" (MPAA Br. 3-4). Concern about anti-competitive conduct comes with ill grace from the trade association of the motion picture industry, the antitrust violations of whose members have been chronicled in some detail over literally hundreds of pages of the United States and Federal Reports.[86] MPAA has not alleged even one

[85] The question whether the record in this proceeding supported the FCC's action is discussed *infra*, pp. 64-67.

[86] See, e.g., *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946) (unlawful conspiracy under Sherman and Clayton Acts involving Twentieth Century-Fox Film Corporation and Paramount Pictures, Inc., both of whom are parties to the MPAA Brief); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (unlawful price fixing conspiracy, conspiracy to restrain trade, block booking, blind selling,

instance of anti-competitive conduct on the part of a cable company which has resulted in any of its members not being able to show its products in the marketplace or why, if any cable company engaged in such conduct in the future, the antitrust laws would not provide a fully adequate remedy.

Moreover, while allegedly seeking to insure an opportunity to offer its products in the marketplace, MPAA does not even attempt to deal with the difficulties raised by its position. It extols the virtues of program diversity (MPAA Br. 12), but what happens if each of the six MPAA members joining in its Brief leases a channel on a multi-channel cable system? Such a cable system, which may have increased its channel capacity from twelve to twenty channels to be able to carry sports, religious, or informational programming, would find virtually all of its channels used to show movies. What would be the rights of public, educational or government access users in that situtation? Certainly the MPAA members, with their vast financial resources, could stake claims to these channels before the other access uses envisioned by the FCC developed. Would the FCC again have to make judgments about whether a sixth or fifth or fourth movie channel was more valuable than another public access channel, or religious programming, or the signal of a non-network or speciality or educational station? What of property rights? How, for example, would MCA, one of the parties to the MPAA Brief, react if a Federal Entertainment Commission, operating under a broad statute like the

unreasonable discrimination, etc., involving Columbia Pictures Corporation, Universal Corporation (a subsidiary of MCA, Inc.), Twentieth Century-Fox Film Corporation and United Artists Corporation, all of whom through their parent or successor corporations are parties to the MPAA Brief); *United States v. Loew's Incorporated*, 371 U.S. 38 (1962) (block booking of films to television stations involving Screen Gems, Inc., a subsidiary of Columbia Pictures Industries, Inc., a party to the MPAA Brief); and *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561 (1951) (conspiracy to monopolize and attempt to monopolize, involving Columbia Pictures Corporation, Paramount Pictures, Inc., and Twentieth Century-Fox Film Corporation, all of whom are parties to the MPAA Brief).

Communications Act, ordered movie companies to make their studios and production facilities available for use by the public, either on a compensated or uncompensated basis, one-twelfth or even one-twentieth of the time with a proviso that if the public wanted more use of those facilities, MCA would have to build additional facilities? And what about the First Amendment? How would MCA or any of the other companies joining in the MPAA Brief respond if a Federal Entertainment Commission ordered them to give up editorial discretion or control over a significant portion of the product they sell to the public?[87] If MPAA members would oppose the imposition of any of these requirements on their businesses, why are they supporting the imposition of similar requirements on cable systems and how would they justify their being treated differently from cable systems?

These are the types of questions raised by the FCC's access rules. MPAA has not even attempted to deal with them but has instead simply asserted that it, too, wants to be able to use cable television facilities. But by its failure to even attempt to deal with the types of problems that would be raised in implementing its desire, MPAA has failed to serve the traditional role of an amicus curiae and has burdened this Court with nothing more than a pale paraphrase of the Government's jurisdictional argument.

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[87] In its Brief (p. 8) in *Home Box Office, Inc. v. FCC, supra* note 45, MPAA stated:

> The FCC may not prohibit speech by one medium of expression (pay-cable) in order to "reserve programming" for use by another medium (conventional television).

Then why may the FCC prohibit speech by cable operators in order to "reserve programming" for MPAA's members? MPAA does not even try to answer this question.

II. THE ACCESS RULES ARE UNCONSTITUTIONAL

A. The Access Rules Violate the Free Speech Clause of the First Amendment

1. The Access Rules Substantially Restrict the Speech of Cable Operators

As discussed in detail above[88] and as recognized by the FCC in the language quoted above from its *Report and Order* on regulation of cable television equal employment opportunity practices,[89] cable operators have "extensive" discretion in selecting program material to distribute to their subscribers. Contrary to the arguments of Petitioners (G. Br. 45; NBMC Br. 45-46 and 49-50; ACLU Br. 22, 28), cable systems are not mere conduits without First Amendment rights.[90] The process of selecting program material is an editorial function which lies at the very heart of the First Amendment. *Miami Herald Publishing Co. v. Tornillo, supra,* 418 U.S. at 258 (hereinafter *"Miami Herald"); Columbia Broadcasting System, supra.* Nor can any meaningful line be drawn for First Amendment

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[88] *Supra,* pp. 10-18.

[89] *Supra,* pp. 36-37.

[90] ACLU cites *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973), for the proposition that conduits have no First Amendment rights. In *Pittsburgh Press,* this Court upheld a prohibition against publication by newspapers of employment advertisements in sex-designated columns. However, the Court's rationale was not that the newspapers served a conduit function in publishing such advertisements. Rather, the Court's decision was based on the commercial speech doctrine, which has subsequently been severely limited in *Virginia Pharmacy Board v. Consumer Council,* 425 U.S. 748 (1976); and *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977). To the extent *Pittsburgh Press* has any continuing vitality, such vitality is limited to two factors not involved here. First, it involved prohibition of speech characterized by this Court as "illegal" because discriminatory. 413 U.S. at 388. Second, as distinguished in the *Virginia Pharmacy Board* case, 425 U.S. at 771-772, n. 24, it involved proposals to enter into commercial transactions rather than dissemination of commercial information.

purposes between entertainment and informational programming. *Winters v. New York*, 333 U.S. 507, 510 (1948); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). Whether cable operators choose to distribute broadcast signals, pay movies, news and information services or other types of satellite-delivered programming, the editorial process by which they make those choices is protected by the First Amendment. Of course, cable systems may also produce their own locally originated programming and, in that way, function as speakers as well as editors. This function is protected by the First Amendment as well.

Moreover, as also discussed in detail above,[91] the access rules restrict the speech of cable systems in a significant and not in a minimal way. The speech of cable operators is restricted because they are deprived of the right to select the programming to be distributed on the access channels or to use those channels for operator-originated programming. In *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), this Court stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .

Thus, only if there is some other permissible basis for restricting the speech of cable systems can the access rules be found consistent with the First Amendment.

2. Cable Television Does Not Share the Characteristics of Broadcasting Which Have Historically Justified Limitation of the First Amendment Rights of Broadcasters

Both the Eighth Circuit in this proceeding (App. 72-74) and the D.C. Circuit in *Home Box Office, Inc. v. FCC, supra*, 567 F.2d at 46, have held that cable television systems are indistinguishable from newspapers for First Amendment purposes, and this Court has already held in *Miami Herald* case that public access requirements may not be imposed upon newspapers.[92] The Government argues (G. Br. 46, n. 37) that this Court has recognized a distinction for First Amendment purposes between the print media and electronic media generally. The Government's suggestion is that all electronic media, including both broadcasting and cable television, have limited First Amendment protection. However, this Court's references to the electronic media are all based on the historic treatment of broadcasting. The Court has not heretofore determined the proper treatment of cable television for First Amendment purposes.

There are two principal characteristics which have historically been asserted as justification for regulating broadcasting in ways which limit the First Amendment rights of broadcasters: (1) spectrum scarcity and (2) pervasiveness and the related characteristic of accessibility to children.[93] But neither of

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[91] *Supra*, pp. 25-30.

[92] The Government argues (G. Br. 40) that the *Miami Herald* case is distinguishable because it involved a right of reply statute which was content-related whereas the cable television access rules here at issue are content-neutral. In *Miami Herald*, this Court did discuss one content-related factor, *i.e.*, that newspapers might avoid discussion of controversial issues if such discussion might oblige them to provide access space for replies. But the Court indicated that even if this factor were absent, the access requirement could not "clear the barriers of the First Amendment because of its intrusion into the function of editors." 418 U.S. at 258.

[93] See, generally, Robinson, "The FCC and the First Amendment," 52 MINN. L. REV. 67, 150-63 (1967). Professor Robinson mentions two other characteristics, the unique power and influence of broadcasting and public ownership of the airwaves. But public ownership is closely related to scarcity, and they have been discussed together in this Court's discussion of the First Amendment rights of broadcasters. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Moreover, public ownership is not alone a basis for denying users of a public facility their First Amendment rights. *Southeast Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). With respect to the influence and power of broadcasting, it is difficult analytically to separate this factor from pervasiveness, and in any event, it could only logically justify regulations designed to restrict specific types of speech where such restriction is consistent with the First Amendment and not to justify regulations which limit the editorial discretion of the speaker.

these characteristics can be relied upon as carte blanche for limiting First Amendment rights.

> Rather each regulatory action must be measured against the nature of the telecommunications to ensure that the action in the particular case is justified by that nature. *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 275, n. 32 (D.C. Cir. 1974) (Bazelon concurring).

The Government argues (G. Br. 45-48) that economic barriers to entry make cable television a natural monopoly and limit the ability of other persons to engage in cablecasting in a way which is analogous to the technological scarcity of broadcast frequencies. However, broadcast regulation has historically been based not on economic scarcity, but on technological scarcity.[94] In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 401, n. 28 (1969) this Court declined to reach the question whether economic scarcity alone could justify regulation limiting First Amendment rights, but that question was definitively decided in the *Miami Herald* case. Advocates of the access concept in *Miami Herald* emphasized that economic factors "have made entry into the marketplace of ideas served by the print media almost impossible," 418 U.S. at 251; that these same economic factors have made the print media a natural monopoly with "one-newspaper towns" a dominant feature, 418 U.S. at 249; that in the newspaper industry there is "effective competition operating in only 4 percent of our large cities," *id.* at n. 13, quoting from a task force report; and that affirmative government action was necessary to create access to the print media, 418 U.S. at 251. These arguments were rejected by the Court and *Miami Herald* is therefore determinative that economic scarcity[95] is not a rationale for limiting the First Amendment rights of cable systems.

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[94] *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 210-214 (1943).

[95] The cable television franchise by which local municipalities grant rights-of-way for cable facilities is not comparable to the broadcast license because it is not based on scarcity or any other rationale which would justify limitations on First Amendment rights of cable systems. Most cable television franchises are non-exclusive, Johnson, Leland L. and Botein, Michael, *Cable Television: the Process of Franchising* (Rand Corporation), March 1973, No. R-1135-NSF. While in most instances there is only one cable system in a community, this results from economic rather than legal or technical considerations, and there are instances where more than one cable operator serves the same community. For example, in Bryan and College Station, Texas, where Midwest operates a cable system, there is a second cable system. Even if the scarcity rationale were applicable to the issuance of cable television franchises, for the reasons set forth *infra*, pp. 53-55, it would not save the access rules from First Amendment challenge. In any event, *local* ownership of rights-of-way cannot justify *federal* regulations.

With respect to the pervasiveness of broadcasting and its accessibility to children, *FCC v. Pacifica Foundation*, 57 L.Ed 2d 1073 (1978), involving the FCC's authority to regulate indecent programming on broadcast stations, is the primary example of the kind of regulation justified on this basis. *See also, Capital Broadcasting Company v. Mitchell*, 333 F.Supp 582, 585-586 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972), where the cigarette advertising ban applicable to electronic but not print media was upheld against an invidious discrimination charge under the Fifth Amendment because of accessibility to children. Cable television does not have the pervasiveness of broadcasting, since it serves only 17.6 percent of the nation's television households,[96] but even if it did, that characteristic is unrelated to the objectives of the access rules. Pervasiveness and accessibility to children have no logical relation to and have never been relied upon to justify regulation which limits the exercise of editorial discretion rather than the prohibition of specific and limited types of speech. Indeed, affirmance of the access rules on the basis of pervasiveness would undercut one of the principal purposes sought to be achieved by the Court in

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[96] G. Br. 4, n. 3. Even in communities where cable systems are in operation, there are many households which do not subscribe. The need to have cable extended to the home and pay a monthly subscription fee is a further indication that cable television does not have the pervasiveness of broadcasting.

Pacifica—the protection of children from indecent material. Absent the editorial discretion removed from cable systems by the access rules, they have no way of preventing the dissemination of indecent or otherwise objectionable programming to children.[97]

Thus, the principal characteristics of the broadcast media which have been relied upon to limit the First Amendment rights of broadcasters are not applicable to cable television. The conclusion flowing from this fact—that cable systems should be accorded the same First Amendment rights as newspapers—is supported by a number of relevant similarities between cable systems and newspapers. As noted above, though there is only one newspaper or cable system in most communities, this results in both cases from economic rather than technological considerations. Though the pages of a newspaper can be increased to make room for the additional material a right of access might produce, this Court has recognized the economic constraints involved in increasing the number of newspaper pages and the impairment of editorial discretion that would result from an access regulation that might require an increase in the number of pages. The Court has therefore not accorded First Amendment significance to the ability of a newspaper to increase the number of pages it prints.[98] The economic constraints on

[97] In a few instances, access programmers have presented programming most cable operators would consider objectionable for viewing by children. *See, e.g.*, "What's All This on TV?", *New York Times Magazine*, May 27, 1973, p. 9. Without the access rules, the cable system is accountable to its subscribers for the way in which it has exercised its editorial discretion.

[98] In *Miami Herald*, 418 U.S. at 256-257, this Court stated:

> The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available. (Footnote omitted.)

cable systems increasing the number of channels they offer and the resulting impairment of their editorial discretion from access obligations are at least as great as those affecting newspapers. Newspapers offer a number of pages or sections appealing to different types of audiences—*e.g.*, comics, sports, society, local news, national and international news, editorial comment and analysis—in an effort to increase their readership. Similarly cable systems offer a number of channels appealing to different types of audiences—*e.g.*, religion, sports, information services, entertainment—in an effort to increase the number of subscribers to their services. Both the newspaper editor and the cable system owner make editorial judgments in selecting these materials and presenting them to their subscribers. Thus, aside from cable television's dissimilarity to those aspects of broadcasting which justify limits on the First Amendment rights of broadcasters, cable systems operate in a manner similar to newspapers for First Amendment purposes, and arguments for limiting the First Amendment rights of cable systems have already been rejected with respect to newspapers. Since there is no basis for treating cable systems differently from newspapers for First Amendment purposes, based upon the *Miami Herald* precedent this Court should affirm the Eighth Circuit's conclusion that the access rules violate the First Amendment rights of cable systems.

3. The Access Rules Would Violate the More Limited First Amendment Rights of Broadcasters

Even if this Court should conclude that the more limited First Amendment protection accorded broadcasters applies to cable television as well, however, the access rules are not consistent with the First Amendment.

As shown above with reference to this Court's opinion in *Buckley v. Valeo*,[99] the effect of the access rules is to exalt the First Amendment interest in promoting individual self-expression by access users above the First Amendment interest in editorial controls by cable operators. The Government has argued:

> [T]he access rules do not present a question of subordinating First Amendment interests to other, unrelated, governmental interests. Rather, to the extent they can be regarded as affecting the First Amendment interests of cable operators, they present a question of competing First Amendment interests. (G. Br. 40)

It should be noted that the D.C. Circuit in *Business Executives' Move for Vietman Peace v. FCC*, 450 F.2d 642, 655 (1971), held that the First Amendment value of individual self-expression affirmatively *required* broadcasters to provide a right of access to their facilities, and this holding was reversed by this Court in the *Columbia Broadcasting System* case. Although this Court in *Columbia Broadcasting System* explicitly declined to reach the question whether the First Amendment would *preclude* the FCC from imposing an access obligation on broadcasters, 412 U.S. at 119, it emphasized the paramount importance of editorial control. The Court clearly indicated that it is less important that everyone have an opportunity to speak than that "everything worth saying shall be said." 412 U.S. at 122, quoting Professor Meiklejohn. And the Court clearly indicated that the editorial function of selecting voices is essential in this regard. The paramount importance of the editorial function was reaffirmed in *Miami Herald*. Thus, the conflict between the competing First Amendment values of promoting individual self-expression and preserving editorial control has already been resolved in favor of preserving editorial control.

For this reason, the access rules could not have been imposed even on broadcasters with their more limited First

[99] *Supra*, p. 48.

Amendment rights. By the same token, they may not be imposed on cable operators, whose First Amendment rights are at least as great as those of broadcasters.

B. The Access Rules Violate the Fifth Amendment

1. Under the Due Process Clause, a Person May Not Be Compelled to Undertake Common Carrier Obligations

A person voluntarily undertaking a business which has the attributes of common carriage may be required to submit to regulation of that business as a common carrier. But may one who has not voluntarily entered the common carrier business be compelled to do so, just because he owns or can build facilities suitable for that purpose? This question was not raised in this form in *Midwest I*. There it had been argued that, just as the FCC could not compel the provision of broadcast services, the FCC similarly could not compel cable operators to engage unwillingly in cablecasting. The Court responded:

> [T]he analogy respondent thus draws between entry into broadcasting and entry into cablecasting is misconceived. The Commission is not attempting to compel wire service where there has been no commitment to undertake it. CATV operators to whom the cablecasting rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking. 406 U.S. 670.

Thus, the Court found that the mandatory origination rule was not fundamentally different from the nature of the business cable systems undertook in providing broadcast signals to their subscribers. The access rules, however, do fundamentally change the nature of a cable system's business by requiring cable systems to function as common carriers.

At the outset, it should be made clear that Midwest's arguments that the acess rules violate the First Amendment and the due process and taking clauses of the Fifth Amendment cannot be avoided merely by the FCC conditioning the right of cable operators to retransmit broadcast signals upon the requirement that cable operators also provide access services. It is well established that the government may not extend a governmental benefit only to those who are willing to accept the imposition of an otherwise unconstitutional condition. As this Court stated in *Frost & Frost Trucking Co. v. Railroad Commission,* 271 U.S. 583, 594 (1926) (hereinafter "*Frost*"):

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Accord: Shapiro v. Thompson, 394 U.S. 618 (1969); *Sherbert v. Verner,* 374 U.S. 398 (1963); *Speiser v. Randall,* 357 U.S. 513 (1958). *See* Note , 117 U.PA.L.REV. 144 (1968); and Note, 73 HARV. L. REV. 1595 (1960).

In *Frost,* this Court also decided that the state could not condition use of its highways by motor carriers on the requirement that they serve all members of the public indescriminately on a common carrier basis rather than choosing to contract with particular shippers.[100] The Court stated:

> [C]onsistently with the due process clause of the 14th Amendment, a private [contract] carrier cannot be converted against his will into a common carrier by mere legislative command. . . . 271 U.S. at 592.[101]

[100] Even the motor carrier provisions added to the Interstate Commerce Act in 1935 allow motor carriers to choose between serving particular shippers on a contract carrier basis or holding themselves out to serve the general public on a common carrier basis. See Sections 203(a)(14) and (15) of the Interstate Commerce Act, 49 U.S.C. §303(a)(14) and (15), recodified in P.L. 95-473 (Oct. 13, 1978) as 49 U.S.C. § 10102(11) and (12).

While the mandatory origination rule in *Midwest I* was affirmed by this Court over a due process challenge, this Court first determined that the rule there before it was consistent with broadcast regulatory goals and was therefore within the context of the cable system's initial undertaking. But *Frost* continues to stand for the proposition that the imposition of common carrier obligations is a fundamental change in the nature of a non-carrier business which violates the due process clause. The access rules impose common carrier obligations on cable systems,[102] and therefore this case falls squarely within even the narrowest reading of *Frost.*[103]

[101] In *Watson* v. *Employers Liability Assurance Corporation,* 348 U.S. 66, 82 n. 3 (1954) (Frankfurter concurring), an apparent inconsistency was noted between the 1926 *Frost* case and *Pierce Oil Corp.* v. *Phoenix Refining Co.,* 259 U.S. 125 (1922). In *Pierce,* this Court upheld an Oklahoma statute requiring oil pipelines to operate as common carriers, as that statute applied to pipeline companies which had entered the state after the statute was enacted, on the ground that the pipeline companies had voluntarily waived their due process rights when they entered the business aware of the statute. The same acquiescence rationale cannot apply to Midwest or other parties which entered the cable television business before the FCC adopted the access rules. Moreover, this voluntary acquiescence rationale stated by the Court in *Pierce* in 1922 must be deemed superseded by the unconstitutional condition concept which was established in *Frost* in 1926 and has been repeatedly affirmed since then. See cases cited *supra,* p. 56.

[102] *Supra,* p. 34.

[103] The Eighth Circuit also concluded that the due process rights of cable systems were violated by the exposure of cable systems to criminal and civil suits for programming presented on access channels because cable systems have no authority under the rules to prevent the presentation of programming that might result in such liability (App. 79-82). Midwest agrees with the Eighth Circuit's analysis, which the Government has not even tried to rebut.

2. The Access Rules Take the Property of Cable Operators Without Just Compensation

The access rules take the property of cable operators because of investments required by 1986 in order to meet the minimum channel capacity requirement; because of investments required immediately for program production equipment which must be maintained locally for access users; because existing cable plant must be used or held available for the distribution of access programming even if the cable operator has other uses for it; and because cable operators are precluded from using their property for their private purposes.

The only aspect of the mandatory origination rule before this Court in *Midwest I* that was remotely comparable to the access rules presented here was the requirement that cable operators invest in program production equipment, since such equipment would have been necessary to comply with the mandatory origination rule. The Court did not find a taking issue in *Midwest I*, but there is a substantial difference between the impact of the equipment requirement under the mandatory origination rule and the access rules. Under the mandatory origination rule, the FCC gave consideration to the problem of compensation for this investment. There was no prohibition against making charges to others who might be permitted to use the equipment. Even if the cable operator used the equipment himself, the FCC permitted the sale of advertising to meet origination costs. In its *First Report and Order in Docket No. 18397*, 20 FCC 2d 201, 215 (1969), adopting the mandatory origination rule, the FCC stated:

> After consideration of the comments, we have concluded that advertising should be permitted at natural breaks in originations with no interruption of program continuity. It appears that advertising support (or some other revenue besides regular subscriber fees) may be necessary to contribute to the financing of local origination in some communities, in view of what the record

> reveals as to the cost of origination equipment and operating expenses.

Here, in contrast, no charges can be made for use of program production equipment for "live public access programs not exceeding five-minutes in length" (App. 173), and the cable operator will obviously have no opportunity to sell advertising during the programming of such access users. Moreover, other costs associated with the access rules, such as the cost of increasing channel capacity, the use of existing channel capacity for public, educational and government access, and the use of the cable system's playback facilities and personnel to present public access programming, will be uncompensated.

The Government argues (G. Br. 49-51) that the access rules do not constitute a taking under standards recently clarified by this Court in *Penn Central Transportation Company v. City of New York*, 57 L.Ed.2d 631 (1978) (hereinafter "*Penn Central*"). In *Penn Central*, 57 L.Ed.2d at 648, the Court quoted its earlier statement in *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960), that the purpose of the taking clause is to

> . . . bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole.

The Court also recognized in *Penn Central*, 57 L.Ed.2d at 651, that

> . . . Government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings."

This is precisely what the access rules do. The FCC believes that it is in the public interest to have available a medium for use by members of the public for self-expression. Cable operators have facilities suitable for this purpose. The FCC, by its access rules, has taken these facilities for public use but has required the cable operators alone to bear the costs.

The Government's argument is essentially that no taking has occurred because the economic-impact of the access rules on cable operators is minimal.[104] This argument is based on at least two considerations. First, the FCC deferred the deadline for compliance with minimum channel capacity requirements until 1986 because it was anticipated that most systems would naturally be rebuilt by that time in any event as a result of equipment obsolescence or a desire to expand channel capacity to accommodate new services (App. 153-161). Second, the FCC made the access rules applicable only to systems of 3,500 or more subscribers so that the cable operator could pass through the costs to subscribers and the incremental cost to each subscriber would be relatively small (App. 113-115).

With respect to the "natural rebuild" concept, if cable operators do increase their channel capacity by 1986 because of equipment obsolescence or a desire to accommodate the new programming services, the same taking problem will exist when the rebuild is completed because cable operators will still be required to provide uncompensated service, to forego the commencement of services which presently exist or may develop between now and the completion of a rebuild, and to displace programming which they have selected for their channels to accommodate access uses. Delaying the taking until 1986 does not eliminate it, and in any event at least one channel is taken immediately.

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[104] The Government appears to argue that since there has been no physical invasion of a cable system's property by the government, there can be no taking (G. Br. 50-51). The Court in *Penn Central*, however, recognized that physical invasion was not necessary for there to be a taking and that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . ., or perhaps if it has an unduly harsh impact on the owner's use of the property." 57 L. Ed. at 650. It also considered in that case "whether the interference with appellant's property is of such a magnitude that 'there must be an exercise of eminent domain to sustain [it].'" 57 L. Ed. at 656, citing *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). Moreover, there was no physical invasion in *Penn Central*, and there is a physical invasion here in that pursuant to government command cable systems must permit an intrusion of their property by access users.

With respect to the possibility of spreading the costs of compliance over a larger number of subscribers to reduce the per subscriber impact, the FCC is in effect recognizing that there are substantial economic burdens associated with the rules, and that these burdens can only be borne by larger systems. But the Government has cited no authority for the proposition that a burden on a business can be ignored because the business can pass the burden on to its customers. This argument also ignores the fact that there may be price resistance to passing on the burden[105] and the fact that the ability of the cable system to pass on the burden may be impaired by the cable system's inability, because of the access rules, to assemble the most desirable program package and thus attract a greater number of subscribers.

The Court's decision in *Penn Central* was based on treating the landmark preservation law there involved like a zoning ordinance because "the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan." 57 L.Ed.2d at 653 (footnote omitted). Thus, the owners of the Grand Central Terminal were not "solely burdened", and indeed they were benefitted, like "all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole. . . ." 57 L.Ed.2d 655.

Clearly the access rules do not involve the application of a comprehensive plan analogous to zoning cases. The landmark preservation law in *Penn Central* applied to over 400 structures in the City. The access rules on the other hand, single out the property of the cable operator in the community to benefit

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[105] From time to time there may be other constraints, such as the President's current voluntary Wage-Price Guidelines, that inhibit a price increase to pass on the burden of providing access channels. In addition, many cable systems need the approval of their local franchising authorities to increase their rates.

those members of the general public who desire an opportunity to use the cable facilities for access program presentation. Moreover, whereas the majority opinion in *Penn Central* found that landmark owners reciprocally benefitted from the law, cable operators derive no reciprocal benefit from the access rules, and in fact they suffer an actual detriment because they cannot offer what they believe to be the most desirable combination of programming on their channels in order to attract the largest number of subscribers. In short, the access rules are not within any recognized exception to the taking clause and therefore do constitute a compensable taking.

It is also clear that the access rules do not provide compensation for the taking. With the exception of leased access channels, the FCC has not allowed cable operators to even attempt to recover their expenses through rates to be paid by access users. On the contrary, the FCC expects cable operators to fund noncompensatory access services with revenues received from subscribers to other cable services. *1976 Order* (App. 113-115). In other words, the FCC expects cable operators to subsidize a noncompensatory common carrier service with revenues derived from their private non-common carrier business.

In *Brooks-Scanlon Company v. Railroad Commission of Louisiana,* 251 U.S. 396 (1920) hereinafter ("*Brooks-Scanlon*"), a company operated a small business as a common carrier by railroad as an incident to its sawmill and lumber business. Although the railroad business showed a loss, the net result of the whole enterprise, including the sawmill and lumber business, was profitable. On this basis, the state commission decided that Brooks-Scanlon could not discontinue its railroad service. This Court reversed, stating:

> The plaintiff may be making money from its sawmill and lumber business, but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it. 251 U.S. at 399.

Brooks-Scanlon continues to be cited for the principle that a company may not be required to subsidize a noncompensatory common carrier service with revenues from its non-carrier business. *City of New York v. United States,* 337 F.Supp. 150, 156 (E.D.N.Y. 1972); *Brooklyn Eastern District Terminal v. United States,* 302 F.Supp. 1095, 1100 (E.D.N.Y. 1969); *Atlantic Coast Line R. Co. v. Public Service Commission,* 77 F. Supp. 675, 683 (E.D.S.C. 1948).[106] In analogous situations, the FCC has held that communications common carriers may not subsidize even one common carrier service with revenues from another. In its *Memorandum Opinion and Order in Docket No. 18128,* 61 FCC2d 587, 589 (1976), *reconsideration,* 64 FCC2d 971 (1977), *further reconsideration,* FCC 78-104 (released Feb. 24, 1978), the FCC established basic rate-making principles for communications common carriers and stated that "the public interest is not generally served by interservice cross subsidization." See also *Computer Use of Communications Facilities,* 28 FCC2d 267 (1971), *affirmed in pertinent part sub nom. GTE Service Corp. v. FCC,* 474 F.2d 724 (2d Cir. 1973), where the FCC adopted rules requiring communications common carriers wishing to provide data processing services to do so through a separate corporate entity with separate books of account, personnel, and equipment, so that the data processing service would not be cross-subsidized from revenues from

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[106] In one respect, *Brooks-Scanlon* has been superseded by later cases. The opinion in *Brooks-Scanlon* indicated that a railroad common carrier could not be compelled to continue a segment of its overall common carrier business at a loss even though other segments were profitable. 251 U.S. at 399. It has since been established that each segment of an integrated railroad common carrier business need not show a profit. *In re Erie Lackawanna Railway Co.,* 517 F.2d. 893, 898-899 (6th Cir. 1975). For example, when a railroad common carrier seeks authority to abandon an unprofitable segment of its operation, the Interstate Commerce Commission can look to the overall profitability of the carrier's railroad business in deciding whether the carrier can be compelled to continue the segment of service. But nothing in the *Erie Lackawanna* case can be interpreted as holding that the ICC can look to the railroad's ability to subsidize the service with unrelated revenues derived from a non-carrier business.

communications common carrier services. Thus the *Brooks-Scanlon* doctrine and related FCC actions make it clear that revenues derived from the non-carrier aspects of a business cannot constitute compensation for the provision of a compelled non-compensatory common carrier service rendered for the presumed benefit of the public.

There is an additional aspect of the access rules which, as applied to Midwest, further highlights the confiscatory nature of the access rules. When the FCC first imposed access obligations on cable operators, it limited their applicability to systems in the top 100 markets. As a *quid pro quo*, such systems were permitted to import more distant signals (App. 106) than cable systems in smaller markets where Midwest operates. Midwest contends that this *quid pro quo* is also invalid under *Brooks-Scanlon* because it requires cable operators to subsidize noncompensatory common carrier services with revenues from a private business expected to be enhanced by the carriage of additional distant signals. But even if the *quid pro quo* for top 100 systems would have been deemed sufficient compensation under the taking clause, that approach was abandoned when the FCC made the access rules applicable to all cable systems with 3,500 subscribers regardless of market location. Midwest's systems are not located in top 100 markets and Midwest does not receive the benefit of any "bonus" distant signals.

III. THE RECORD BEFORE THE FCC WAS INSUFFICIENT TO SUPPORT THE ADOPTION OF THE ACCESS RULES

The Government has argued (G. Br. 31-32 n. 29) that there was record evidence of "significant demand" for access channels, referring to comments in the rulemaking proceeding which showed that the city and county schools in San Diego, California, were using educational access channels and also referring to a survey by the National Cable Television Association which showed that 36 of 145 cable systems surveyed indicated that their access channels were used regularly for an

average of 18 hours weekly. On the other hand, the Eighth Circuit summarized the record before the FCC as follows:

> The record of the *1976 Report* is replete with comments that, though there was "awareness" of access programs, few people with something to say were interested in producing them; that almost no one wants to watch in many segments of our vast country; that when access had been tendered it had not been used and had been rejected by subscribers; that offers of access had been declined by schools which owned television equipment for its use; that a survey of 149 cable systems showed their access channels, offered under the *Cable Report* rules, went unused an average of 92% of the time; that another survey of 10,000 subscribers showed 97% disinterested in viewing access programs if they cost $1.75-$2.00 per month; that access programs had been voluntarily provided when subscriber interest warranted them. There was no evidence that ordinary market demand could never result in access programs, or that a solemn silence would descend in the absence of mandatory access rules. There was no evidence that programs of so little interest or value that no one and no group is willing to purchase time to present them would garner viewers. (App. 89-90 n. 87)

Indeed, as the Eighth Circuit noted (App. 86-88), the FCC itself explicitly and implicitly recognized that there was insufficient evidence of demand. The FCC explicitly found that access channels "are at best sporadically programmed," *1976 Order* (App. 138), and that "even larger systems typically have difficulty finding access channel users," *Reconsideration* (App. 191). Furthermore, by choosing to mandate the construction and dedication of channels rather than relying on a voluntary response to marketplace forces, the FCC implicitly recognized that there was no meaningful evidence of demand for access services. Thus, rather than being based on any showing of demand or need for access channels, the FCC relied on its

"hope" that its requirements for rebuilding cable systems and reserving one or more channels for access would "foster the provision of such services. . . ." *1976 Report* (App. 156).

This hope is belied by experience. In abandoning the mandatory origination rule approved in *Midwest I*, the FCC confessed the futility of seeking to mandate local programming when economic considerations did not justify it. *Report and Order in Docket No. 19988*, quoted *supra*, p. 2. The access rules suffer the same deficiency. As indicated in the Eighth Circuit's summary of the rulemaking comments, quoted above, experience shows that available access channels go unused 92% of the time. A demand for access services cannot be created by law. If there is demand, cable systems will respond to the call of the marketplace.

The Government argues on the basis of this Court's opinion in *FCC v. National Citizens Committee for Broadcasting*, 56 L.Ed.2d 697, 726 (1978), that the FCC should be allowed discretion to forecast the direction in which the future public interest lies. In *National Citizens Committee*, this Court upheld newspaper-broadcast cross-ownership restrictions designed to promote competition and diversity of voices. The Court stated that the FCC was entitled to rely on its judgment about the probability of diverse viewpoints from commonly-owned communications media without requiring evidence of specific abuses because the benefits of competition are by nature not easily quantified. 56 L.Ed.2d at 715. In contrast, the demand for cable television access services is quantifiable and even the FCC recognized that the clear weight of the evidence before it was that there is no significant demand for such services. In this critical aspect, the FCC's access rules are distinguishable from the newspaper-broadcast cross-ownership rule at issue in *National Citizens Committee*.

There is a second basis for distinction as well. The newspaper-broadcast cross-ownership rule did not raise a taking issue because even in cases where divestiture was required,

the divestiture would be by sale and the purchase price would satisfy the compensation requirement. In contrast, it has been shown above[107] that the access rules do raise a taking issue. Where a possible unconstitutional taking is involved, the Court should be less inclined to uphold rules on the basis of mere hope and intuition.

Finally, the FCC's reliance here on hope and intuition unsupported by any record evidence raises a serious problem in connection with the First Amendment issue. As discussed above,[108] by requiring cable operators to reserve channels for access uses, the FCC has violated the operators' First Amendment right to use the channels for programming they selected or produced. In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), this Court held that a government regulation which affects First Amendment rights cannot be sustained unless it furthers an important or substantial government interest and the incidental restriction on First Amendment rights is no greater than is essential to achieve the government interest. In the rulemaking context, these requirements translate into a need for a convincing record. *Home Box Office, Inc. v. FCC, supra*, 567 F.2d at 50. While Midwest has in its First Amendment argument shown that the access rules involve more than an incidental restriction on its First Amendment rights, there is in any event no convincing record of need or demand for access services sufficient to outweigh the restriction on the First Amendment rights of cable operators.

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[107] *Supra*, pp. 58-64.
[108] *Supra*, pp. 47-48.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit setting aside the access rules and the related channel capacity and equipment availability requirements should be affirmed.

Respectfully submitted,

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